Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

MICHAEL MC WILLIAMS,
Petitioner,

versus

AMSTAFF, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

MICHAEL MC WILLIAMS
6662 Hetzel Drive
Milton, Florida 32570
(850) 983-0492

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Does the Petitioner have the right in pursuit of the First United States Constitution and s. 5, Art. 1 of the State constitution to petition and defend himself with ultimate facts or can the judges use their gatekeeping authority to ignore the undisputed ultimate facts and expert witnesses (Doctors) and dismiss all the ultimate facts and claim anything they please.

2. Does the Petitioner McWilliams (Teacher) have the right to defend himself, if he is attacked from behind by a student in class or any other person in the United States (instant case, can a teacher restrain a student attacker without harm to the student, without forfeiting worker's compensation).

CORPORATE DISCLOSURE STATEMENT

All parties do not appear in the caption. The Parent of AmStaff Human Resource Inc., (co-employer) and Liberty Mutual Insurance Company is Escambia Charter School (Client company) that is sponsored by and a part of the Escambia County School District and funded by the State of Florida.

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I. OPINION AND ORDERS BELOW

The decision of the Supreme Court of Florida that gave rise to this petition is unpublished as *Michael McWilliams vs. AMSTAFF*, Liberty Mutual Case No.: SC05-405, Lower Tribunal No.: 1D03- 2849, OJCC Case No.: 02-048703DWL, and is reprinted in the Appendix C bound herewithin. The Petitioner filed a response to a series of orders by The Supreme Court of Florida based on This Court's Instructions. The Supreme Court of Florida May 24, 2005 response is pursuant to their previous orders; and Please also be advised that the above styled case is final in this court and no further pleadings may be filed. The Supreme Court of Florida dismissed the petitioner's Motion to reinstate the Appeal and Objects to the Supreme courts order and Petitioner's Appeal's this Case Directly to the United States Supreme Court. Petition for Writ of Certiorari, a April 26, 2005 order Motion for rehearing is hereby stricken as unauthorized. Appendix D. The Supreme Court of Florida dismissed the petitioner's petition for review, in favor of AMSTAFF, Liberty Mutual Motion of Appellee to Dismiss review, Case No.: 1D03-2849 "Affirmed"; It appearing to the Court that it is without jurisdiction, the Petition for review is hereby dismissed. See *Jenkins v. State*, (Affirmed). No Motion for rehearing will be entertained by the Court on March 10, 2005, in an unpublished order that is reprinted at Appendix C. The Supreme Court of Florida claims it lacks jurisdiction to review a decision affirmed by the District Court of Appeal, First District, State of Florida "Per Curiam Affirmed" opinion Filed February 4, 2005 is reprinted in the Appendix A. The District Court of Appeal, First District, order comes after the Appellant's reply brief; There was no Competent Substantial Evidence For the Judge Of Compensation Claims to deny compensability, A December 30 2003, order of the court; Appellee's answer brief filed December 23, 2003, is accepted as timely filed. A December 12, 2003 order Counsel for appellant shall en-

sure preparation and transmittal of the supplemental record within 30 days; Stipulation correcting and supplementing record pursuant to rule 9.200(f). An October 30, order Appellant's brief shall be filed on or before December 1, 2003; Appellant's motion filed October17, 2003, for extension of time for service of the initial brief. All Appendix A. The Appellant Appeals the Judge Of Compensation Claims order denying all benefits on June 13, 2003 (Appendix B) with JCC supporting case (A).

II. JURISDICTIONAL STATEMENT

Petitioner/appellant was involved in a hostile environment at the Escambia Charter School (guns, threats, Harassment) and was attacked from behind "without warning" in class by a student, evidence proffered. The nature of relief sought by Michael McWilliams, Section 440.02(36), Pleading in a worker's comp claim, seeking benefits or award for compensability, temporary partial disability benefits and future medical treatment. On June 13, 2003, the Judge Of Compensation Claims denied all benefits. This case raises questions concerning the JCC acting in bad faith and his misapplication of Florida's Worker's compensation laws/rules and procedures, his opinion filed June 13, 2003 was outside the range of discretion delegated to the agency by law and unconstitutional based on the undisputed ultimate facts. The District Court of Appeal, First District, State of Florida opinion Filed February 4, 2005 is without remdy it "Per Curiam Affirmed" the JCC opinion filed June 13, 2003, but failed to address the appellant's Answer brief and initial brief statements that the JCC erred. The Supreme Court of Florida March 10, 2005 opinion dismissed the case for lack of jurisdiction "Affirmed" that fails to address the Petitioner's petition for redress of grievances before the various governmental entities of this state as protected by the First United States. The Supreme Court of Florida dismissed the petitioner's Motion to rein-

state the Appeal and Objects to the Supreme courts order and Petitioner's Appeal's this Case Directly to the United States Supreme Court. Petition for Writ of Certiorari, an April 26, 2005 order Motion for rehearing is hereby stricken as unauthorized. The Petitioner filed a response to a series of orders by The Supreme Court of Florida based on This Court's Instructions. The Supreme Court of Florida May 24, 2005 response is pursuant to their previous orders; and Please also be advised that the above styled case is final in this court and no further pleadings may be filed. The Petitioner's Writ of Certiorari is being timely filed with rule13.1, 13.5 and rule 30 due date July 22, 2005. This Court has Jurisdiction pursuant to 28 U.S.C. ss 1746 or 28 U.S.C. ss 1651.

III. CONSTITUTIONAL AND STUTORY PROVISIONS INVOLVED OR STATUTES AND RULES

This case raises questions concerning the JCC acting in bad faith and his misapplication of Florida's Worker's compensation laws/rules and procedures, his opinion filed June 13, 2003 was outside the range of discretion delegated to the agency by law and unconstitutional based on the undisputed ultimate facts. The District Court of Appeal, First District, State of Florida opinion Filed February 4, 2005 is without remedy it "Per Curiam Affirmed" the JCC opinion filed June 13, 2003, but failed to address the appellant's Answer brief and initial brief statements that the JCC erred. The Supreme Court of Florida March 10, 2005 opinion dismissed the case for lack of jurisdiction "Affirmed" that fails to address the Petitioner's petition for redress of grievances before the various governmental entities of this state as protected by the First United States Constitution and s. 5. Art.1 of the State constitution:

> "It is the intent of the legislature to protect the rights of Florida's citizens to exercise their rights to peace-

fully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First United States Constitution and s. 5. Art. 1 of the State constitution. The legislatures..."

Florida Statutes 2004 Title X 120.68 judicial review. 120.68 (1) "A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order...or...administrative law judge...is immediately review able if review of the final agency decision would not provide an adequate remedy". Fla.120.68(7); (c) The Fairness of a proceeding ... "failure to follow prescribed procedure"; (d) The agency has erroneously interpreted a provision of law.... (e) the agency's exercise of discretion was:

1. outside the range of discretion delegated to the agency by law;

2. inconsistent with agency rule;

3. inconsistent with the official stated agency policy or prior practice, if deviation therefrom is not explained by the agency;

4. Otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for the agency on an issue of discretion.

See Fla. Rapp. P9.100(b) The original jurisdiction of the court shall be invoked by filing a petition, accompanied by a filing fee or by rule 9.030(a) (5) pass upon a question certified to be of great public importance (6), (c) 28 CFR CH. 1(7-1-04 edition) ss18.10 Rehearing. (a) "Any appellant dissatisfied with a final agency decision under ss 18.9 may, within 30 days after the notice of the final agency decision is sent, request a responsible agency to re-review"

(b) If the responsible agency official finds that the appellant has:

(1) Presented evidence or arguments which is sufficiently significant to require the conduct of further proceedings; or

(2) "Shown some defect in the conduct of the initial hearing sufficient to cause substantial unfairness or erroneous finding..."

Fla. Stat. ss 440.02(36) claimant's(teacher) injuries "arise out of" work performed within the course and scope of employment was the major contributing cause of injuries.

Fla. Stat. ss 440.09 claimant's proved his injuries within medical certainty by objective findings (Doctor's Depo)

Fla. Stat. ss 440.02(32) Requires claimant to prove a causal link between an employee's actual work function and the injury "the work perform" must be the " major contributing cause" of the injury.

Due process, Amend. 14, ss1, note 1022. Inferences. "A statute, creating an inference that is given effect of evidence to be weighed against the opposing testimony, violate this clause if created by a state statute and due process clause of Amend. 5. *Internal Revenue v. Bian Peanut Co.*; (AFFIRMING is an Inferences)

Florida Statutes 440.25(e) order shall set forth the findings of ultimate facts and mandates.

IV. STATEMENT OF THE CASE

The petitioner is the appellant/claimant in a worker's compensation claim, Section 440.02(36), seeking benefits or award for compensability, temporary partial disability benefits and future medical treatment for a neck injury cause by an ECS student jumping/attacking the petitioner (teacher) from behind with out warning in class. The JCC David Langham June 13, 2003 order denied Petitioner/ Appellant benefits, stating petitioner injured himself re-

moving the student from his back. The June 13, 2003 order entered by JCC David Langham was in bad faith, it was not based on the ultimate facts in the record or required by law, Florida Statutes 440.25(e) "order shall set forth the findings of ultimate facts and mandates". The Judge David Langham asked each attorney to right a final order. Judge David Langham Favored, ratified, and adopted Amstaff and Liberty Mutual attorney's Mr. Magie's final order that was not based on the ultimate facts in the record required by law.

The JCC Judge Langham furthermore stapled an opinion from Mr. Magie's own previous case (No.: 265-04-0429) that is in conflict with the JCC Langham's June 13, 2003 order denying petitioner benefits. The order (July 9, 2000) stapled to the JCC June 13, 2003 order that was used to deny petitioner benefits, basically states a worker at a local paper mill punched a door because he was mad at his wife. The District Court of Appeal (Case No.: 1D01-3202) affirmed the JCC order (July 9, 2000) denying compensability. Appendix A.

The JCC Judge David Langham contradicts himself in his June 13, 2003 order and "has erroneously interpreted a provision of law..." in his opening statements and through out the June 13, 2003 order and it is not clear if Judge David Langham considered all the evidence or failed to consider all the evidence/testimony? Judge David Langham refused to hear the claimant connect the issues (dates, times, people) together with his school documents related to the case or let petitioner McWilliams authenticate his documents (Ecambia Charter School's Principal letters to petitioner, attackers letter, petitioner's discipline forms, zero tolerance rule, etc.), that is clearly allowed under the rules of admissible evidence. The JCC denied the evidence based on several objection (15 times in ten minutes) (hearsay, refreshing memory, etc.) from AmStaff/liberty attor-

ney Mr.Magie who falsely claimed "I didn't even know about the documents". Mr. Magie gave the petitioner/claimant several documents himself from the ECS principal and CEO.

Three letters from AmStaff/Liberty/Escambia Charter School were given to my first undecided attorney on Nov. 7, 2002 as evidence to cancel Petitioner/Appellant/claimant's benefits on Nov. 4, 2002, after the fact. Judge David Langham failed or refused to review those letters as well as the other documents (dismissed evidence). The Petitioner/Claimant was hit and threatened three times, on three different days (Oct. 24, 25, 29) by the student attacker David Thompson. David Thompson was not expelled. He threaten me again on Oct 29. On Oct. 24, 2002, X teacher Mr. Augistine witnessed the student David Thompson hit the Petitioner at lunch. Mr. Augistine did not witness the Oct. 25 attack that injured the Petitioner/Claimant in his 7th period class. Judge David Langham failed to review the testimony and record, he confuses the facts and lump all three incidences into one day of his June 13 order to deny the Petitioner/Claimant Worker's comp benefits basically stating the petitioner McWilliams lied and injured himself. All evidence proffered.

Judge David Langham makes a bias claim against the Petitioner/Claimant in his June 13, 2003 final order that are "outside the range of discretion delegated to the agency by law." The JCC portrays the Petitioner/Claimant in a bad light. Judge Langham: "I accept that David Thompson and Mr. Godwin's account of this is the more credible and believable. Claimant's attempt"... The undisputed record/transcript shows David Thompson admitted jumping the Petitioner/Appellant from behind without warning in class.

Employer/Carrier defenses amended pretrial stipulation claim; Claimant teacher, "grabbed a student in class... shortly after the student approached claimant from rear

and claimant reached behind him, grabbing the student, ...Wrestling move... "Horseplay"... David Thompson was the one wrote up for "Horseplay" several times by the Teacher/Claimant before this incident.

The JCC accepts the roll reversal claims by the Escambia Charter School/co-employer AmStaff and their defense witnesses as fact, students good, teacher bad. David Thompson testified he was kicked out of school around 100 times for assault and battery and two weapon charges. Justin Godwin was not a witness to the attack, he was suspended on Oct. 25 for refusing to take detention for threatening the Petitioner/Claimant. By adopting Amstall/ Liberty attorney's Mr. Magie incorrect order, Langham engaged in conduct that constituted gross negligence or acted in bad faith and contributed to the loss, damage, or injury suffered by the Petitioner and by making bias remark in his order against the Petitioner.

The District Court of Appeal, First District, has accepted attached transcripts from other hearings to the JCC order under review dated June 13, 2003. The JCC combining/stapling of order's from another hearing confuses the issues or transcripts from another hearing with the final merit of the Petitioner/Appellants final merits. Amstall/ Liberty's attorney, Mr. Magie, tries to confuse and twist the facts in Petitioners case with a previous case attorney Mr. Magie won for employer, International Paper. The claimant in that case punched a door in anger and injured himself.

Petitioner was involved in a hostile environment at the Escambia Charter School (guns, threats, harassment) and was attacked from behind "without warning" in class by a student, ultimate fact. In self-defense, McWilliams restrained the student attacker with a wrestling hold without harm to the student. X teacher, Anne Broxon, testified that she was a witness to the hostile environment at the

E.C. School and claimed students threatened to kill her.

All critical testimony/evidence has been overlooked by the JCC, the record favored the Petitioner's case. The District Court of Appeal, First District, has abused discretion by failing to address specifically the allocation of pleadings and persuasion of burden of the ultimate facts in the record and in Petitioner's/Appellant's Reply Brief prepared by Appellant's attorney January 7, 2004 and Appellant's initial brief Nov. 25, 2003 for a worker's comp case and simply adopts the worker's comp David Langham's June 13, 2003 order that was not based on the ultimate facts, just twisted facts, an unrelated opinion and disputed evidence in the record/transcript. The court system has ignored the obvious facts including the doctor's deposition.

The Petitioner/Appellant went though 4 weeks of physical therapy after he was injured (Petitioner's doctor's prescription). Respondent's Worker's comp doctor stated the Petitioner/Appellant/Claimant was injured and needed a MRI. The doctors did not cancel the Petitioner's worker's comp. The Respondents/Co-employer Esacambia Charter School principal, Mr. Chisolm, it appears canceled the worker's compensation in retaliation after one doctor's appointment when the petitioner called in sick on Nov. 4, 2002 to go to his 2nd w-comp doctor's appointment. The principal made a false statement accusing Petitioner/Appellant of "horseplay". The claim was based on the students word/statement a week or more after the attack. The ECS principal failed and refused to file an accident report of the attack (Fed.law) based on the Petitioner's statements a week earlier as required by law. McWilliams' worker's comp was canceled within the hour before Petitioner/Appellant/Claimant's appointment that same day, on Nov. 4, 2002. The District Court of Appeal, First District, has issued an Opinion February 8, 2005 "per curiam affirming" the June 13, 2003 order entered by OJCC David Langham

The District Court of Appeals affirmed the lower tribunal June 13, 2003 order that violated the rules in pursuant to 440.02(36), 440.09, 440.25(e) and Petitioner's civil rights.

The Petitioner filed an appeal to the Florida Supreme Court. The Florida Supreme Court order, March 10, 2005, claimed it is without jurisdiction, petition for review is hereby dismissed. See *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). No Motion for rehearing will be entertained by the court. The Petitioner filed a motion. The Florida Constitution and Florida Statutes clearly shows the Florida Supreme Court has the jurisdiction to review this case in pursuant of article 5 section 3(b) Jurisdiction.—The Supreme court, (1), (3), (4) public concern.... (5)....proper administration of justice throughout the state...Florida Statutes 2004 Title X 120.68 judicial review. 120.68(1) "A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order...or ...administrative law judge...is immediately reviewable if review of the final agency decision would not provide an adequate remedy". The Petitioner believes, Judge David Langham's June 13, 2003 order adopted by the State is unconstitutional. The agency's exercise of discretion was outside the range of discretion delegated to the agency by law and inconsistent with agency rules. The JCC comments about the Petitioner are also unfair. If you remove the student attacker from the picture or if the student did not attack the teacher/petitioner, McWilliams from behind in class, the Petitioner/Appellant would not be injured. The Florida Supreme Court has refuses to address the issue that the JCC acted in bad faith in this case, the JCC claims that the Petitioner/Appellant injured himself is not supported by evidence. The United States Supreme Court April 26, 2005 order rehearing is hereby stricken as unauthorized. This Court has Jurisdiction pursuant to 28 U.S.C. ss 1746.

V. REASON FOR GRANTING THE PETITIONS

The JCC Judge acted in bad faith and used his gatekeeping authority to block or dismiss the Petitioner/Appellant/Claimant's critical evidence to defend himself from false claims and the JCC portrayed the Petitioner/Appellant/Claimant's in a bad light by making a bias statement against the Petitioner: Judge Langham stated in his June 13 order: "I accept that David Thompson and Mr. Godwin's account of this is the more credible and believable. Claimant's attempt".... There was no evidence in the record to support the JCC statements.

The record/transcript shows David Thompson jumped the Petitioner/Appellant from behind without warning. David Thompson testified he was kicked out of school around 100 times for assault and battery and two weapon charges. Appendix B. Justin Godwin was not a witness to the attack, he was suspended on Oct. 25 for refusing to take detention for threatening the Petitioner/Claimant. The dismissed evidence shows David Thompson was talking about Justin Richard in his Nov. 4, 2002 letter that was also dismissed/denied by the Worker's comp Judge David Langham. District Court of Appeals, First District, erred (Affirming), it acted in bad faith or with malicious purposes or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

Due process, Amend. 14, ss 1, note 1022, inferences "A statute, creating an inference that is given effect of evidence to be weighed against the opposing testimony, violate this clause if created by a state statute and due process clause of Amend. 5...*Internal Revenue v. Bian Peanut Co*....; If it is insufficient to plead opinions, theories, legal conclusions or arguments, *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) then why do the Respondent continue to do so, a major parts of Langham's/Mr. Magie final order was based on the employer's attorney

Mr. Magie's own opinions, theories and implied conclusions which ignored the "ultimate facts" in the instant case. Florida Statutes 440.25 (e) order shall set forth the findings of ultimate facts and mandates. The Judge David Langham knowingly participated, ratified, condoned or consented to such conduct by signing Mr. Magie's final order. By signing the order the judge David Langham engaged in conduct that constituted gross negligence and that contributed to the loss, damage, or injury suffered by the Petitioner/Appellant. Judge David Langham on July 2, 2003, attached a unrelated opinion from the AmStaff/Liberty Mutual's attorney to Judge David Langham's June 13, 2003 order that is unrelated to the facts in the Petitioner/Appellant worker's comp case that the District Court of Appeals, First District, has adopted in error.

A. In general the agencies has failed to address or remedy the OJCC claims, that erroneously interpreted a provision of law and that are inconsistent with agency rule and that are in conflict with the opinion attached to the OJCC opinion. Therefore passing upon a question certified to be of great public importance and to the fairness of a proceeding which fails to follow prescribed procedure based on the ultimate facts. The Petition/Appellant shows the District Court of Appeal, First District, erred or abused discretion by failing to address specifically the allocation of pleadings and persuasion of burden, but simply adopted the Worker's comp judges' June 13, 2003 order not based on the "ultimate facts" or simply relied on: "wisdom and expertise of a trial judge to exercise their gatekeeping authority when assessing whether all, some, or none of the evidence related to the employer... alternative avenue warrant introduction at trial". 325f.3d, 463.

There is no cause for leaving Federal District Court thus unguided. *Pennsylvania State Police v. Suder*, 325 f.3d 432 (2004), vacated and remand. The appellant present

genuine issues of material fact concerning Petitioner's/ Appellant's hostile work environment, constructive discharge, Worker's comp claim and misconduct claims (court system) that injured or damaged the Petitioner.

The facts are Mr. Magie objected (R-W.C trans., page 18, line 11, 19, 22: The court: "stop, stop, please sir.", line 23-I object, your honor). Mr.Magie: "I didn't even know about the documents" (R-W.C. Trans. Page 20, line 1-2). Mr. Magie's clients gave most of the documents to the Appellant's attorney and Mr. Magie himself gave Appellant 3 letters at the deposition. The Appellant was forced to just recall the student discipline referrals from memory and Mr. Magie still keep on objecting stating hearsay. On page 23, Mr. Magie: "Let me object again. Mr. Magie/Appellee and OJCC himself would not let Appellant use the documents to connect the issues. Appellant's attorney decided to move on because Mr.Magie was objecting all the time. The Appellant's own attorney was absent from the mediation and first deposition hearing and could not connect the issues because he refused to let Appellant explain the evidence/documents to him before the hearing. The Appellant's attorney wanted to keep the case simple, the student jumped the petitioner/appellant from behind and injured the Petitioners neck, ultimate fact. The Petitioner/ Appellant's attorney did not anticipate the employers ECS/ AmStaff false claims and false witness and the States conspiracy against the Petitioner/Appellants to ignore all evidence in all cases on this matter. The judge David Langham asked Petitioner to put away all his documents. Respondent's attorney, Magie, objected a few more times to the Petitioner/Appellant's statements.

Petitioner/Appellant's evidence/documents where not used to connect the issues at the Worker's comp hearing as the transcript show. My Civil Complaint is the Appellant's evidence and rebuttal to Mr. Magie's Florida Bar investi-

gation statement, that said the documents were heard, this statement was incorrect and written by Mr. Magie to support/favor the JCC and respondents in the petitioner's civil complaint.

The OJCC Judge Langham favored AmStaffs/Liberty attorney, Mr. Magie's ever wish and created a Kangaroo court or legal sham. The respondents witnesses disputed testimony was used as facts and not compared to the evidence and other testimony. The respondents and co-employer Escambia Charter School did not perform their duties as required by the law and violated McWilliams civil rights. All the respondents, Florida court system and co-employer, Escambia Charter School, Escambia School District, deviated from their duties (scope of employment) to participate in this cover-up, which violated Appellant's civil rights and denied petitioner a fair hearing.

Petitioner/Appellant was also a state employee. The Respondents and OJCC Judge own action/claims against the Appellant (not in scope of employment) can also be used against the Respondents/Appellees/ECS and the JCC, themselves with the facts.

The District Court of Appeal, First District, has erred (affirming), they had no competent substantial evidence to deny Petitioner/Appellant (McWilliams) petition/benefits 440.02(36), 440.09, based on that Petitioner's/Appellant's/ Claimant injuries did not "arise out of" work performed within the course and scope of employment as required by section 440.02(36). The statement of facts in this writ and pursuant to 440.25(e) "ultimate facts". Petitioner's/ Appellant's Reply Brief prepared by Appellant's attorney January 7, 2004 and Appellant's initial brief Nov. 25, 2003. All the doctor's reports proved medical certainty by objective findings as required by section 440.09 Florida Statutes. The Petitioner injury occurrence did arise out of work performed within the course and scope of Petitioner em-

ployment. The District Court of Appeal, First District, did not address or compare the supplementing record 48-53 (5 min. of 4 hr. depo. and 4 hr. hearing), Petitioner self-employment, his 30 job appl., lifting was apart of doctor's therapy and the undisputed facts (all evidence proffered).

B. In General the agency's exercise of discretion was outside the range of discretion delegated to the agency by law and unconstitutional. The Judge of compensation claims, claims he denied compensation because the injured teacher, McWilliams, deviated from his scope of employment (in self defense) and injured himself removing the student attacker from his back in class.

Based on the JCC findings, McWilliams injured himself while removing the attacker from his back, the District Court of Appeal, First District, affirmed the JCC order and the Florida Supreme Court dismissed or refused to hear Petitioner's appeal. Therefore no one has the right to defend himself against an attacker, rapist, etc. in Florida, because it you get injured defending yourself, it's your fault claims the Florida court system. All the agency's exercise of discretion was outside the range of discretion delegated to the agency by law and unconstitutional. *Vigliotti v. Kmart Corporation*, 680 So. 2d 466 (Fla. 1st DCA 1996) sets forth a two part test for determining compensability in post-1994 workers compensation cases: The claimant must have been performing work in the course and scope of his employment, and two performed by the claimant must be a major contributing cause of the claimant's injury. *Id.* at 467. In *Vigliotti*, the appellant claimant was a door greeter who was injured when she slipped and fell after clocking out but before she had left the premises of the store. In response to appellee's argument that the new definition of arising out of under Section 440.02(32), Fla. Stat. (Supp. 1994) required appellant to prove a casual link between an employee's actual work function and the injury, ie., "the

work performed" must be the major contributing cause of the injury, this court explained:" The JCC and District Court of Appeals, First District, erred in concluding that the Petitioner/physical reaction to the assault was the major contributing cause of claimant's injury. Although the JCC in the instant case expressly determined that the danger to teachers from unprovoked attacks by student was foreseeable, (I:183). The employee was on the premises fulfilling his essential job function of teaching delinquent student when he was assaulted from behind without warning, and further because such unwelcome phsyical contact was foreseeable and in the increased zone of risk for teacher employed at the Escambia Charter School. The JCC and District Court of Appeals, First District, erred in denying compensability and determining claimant's injury did not arise out of or occur within the course and scope of his employment. X teacher Mr.Augistine witness the same student David Thompson hit the Petitioner/Appellant on lunch duty the day before the Petitioner/Appellant was injured by the student. Anne Broxon testified and stated that students threatened to kill her. 75 teachers have left or quit the Escambia Charter School in 7 years and 15 teachers left the year Petitioner/Appellant was injured in the 2002-2003 school year (150% teacher turn-over rate).

See also, *Orange County MIS Dept. v. Hak*, 710 So.2d 998 (Fla. 1st DCA 1998) holding there may be numerous contributing causes leading to an injury but must establish that the employment occurrence is the most preponderant cause of injury. The Petitioner was assaulted from behind without warning and injured in his 7th period class on the school premises, "Ultimate Fact".

VI. CONCLUSION

In summary, the Petitioner Briefs refer to the record in Appendix A and contends that the District Court of Ap-

peals, First District, findings, JCC June 13, 2003 order is incorrect and their orders are devoid of merit and ultimate facts. There was no substantial evidence to support the District Court of Appeals, First District's order Affirming JCC June 13, 2003 order. Florida court system just chose to support the power struggle in the community/state and interfered in the case and deprived the Petitioner of his civil rights and due process in pursuant of the First United States Constitution and s. 5. Art.1 of the State constitution. The Florida District Court of Appeal, First District, I believe has erred. They acted in bad faith as well as the Workers comp Judge David Langham. The agency has erroneously interpreted a provision of law and their findings are unconstitutional. The Florida Supreme Court erred, Petitioner's appeal stricken and unauthorized.

Therefore, the Petitioner's worker's comp 440.02(36) benefits should be awarded for compensability, temporary partial disability benefits, and future medical treatment, in the instant case. The Petitioner has the civil right to receive a fair hearing. The writ will be in aid of rule 20, 28 U.S.C. 1651 of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and adequate relief cannot be obtained for worker's comp benefits from any other court to the best of my knowledge.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D03-2849

MICHAEL McWILLIAMS,
Appellant,

v.

AMSTAFF and LIBERTY MUTUAL GROUP;
Appellee.

Opinion filed February 4, 2005.

An appeal from an order of the Judge of Compensation Claims.

David W. Langham, Judge.

Michael J. Valen of Thomas J. Ueberschaer, P.A., Pensacola, for Appellant.

Roderic G. Magie, Pensacola, for Appellee.

PER CURIAM.

AFFIRMED.

ALLEN. DAVIS and BROWNING, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

Michael McWilliams, Appellant, vs. AmStaff and Liberty Mutual Appellees.	OJCC Case No.: 02-048703PNS David W. Langham Judge of Compensation Claims District "A" West D/A: 10/25/2002 DCA Case No.: 1D03-2849

APPELLANT'S REPLY BRIEF

FOR APPELLANT:
Michael J. Valen, Esquire
Florida Bar No.; 997633
THOMAS J. UEBERSCHAER, P.A.
601 N. Baylen Street
Pensacola, Florida 32501

PRELIMINARY STATEMENT

In this brief the appellant, Michael McWilliams, will be referred to as "Claimant." The Appellees, AmStaff and Liberty Mutual, will be referred to as "Employer/Carrier" or "E/C." All claims' adjusters for Liberty Mutual that handled Claimant's claims will be collectively referred to as "Adjuster." The Judge of Compensation Claims will be referred to as "JCC." The Record of Appeals is in one volume. The pages in Volume I are numbered 1 through 193. References to the Record will be denoted by the Volume number and the appropriate Page number, (V#:P#).

ARGUMENT

I. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSATION

CLAIMS TO DENY COMPENSABILITY ON BASIS THAT CLAIMANT'S INJURIES DID NOT "ARISE OUT OF" WORK PERFORMED WITHIN THE COURSE AND SCOPE OF EMPLOYMENT AS REQUIRED BY SECTION 440.02(36).

It defies logic that the JCC found a teacher with an unblemished record less credible than a juvenile delinquent student with a history of expulsion for assault and battery and weapon possession on campus. Be that as it may, the fact is undisputed that this same student jumped on Claimant's back from behind without provocation while Claimant was attempting to teach class. As a direct result, Claimant sustained serious cervical injuries possibly necessitating complex surgery.

If the JCC's order is affirmed, the tort liability of both Escambia Charter School and AmStaff is patently obvious. Therefore, the decision of *Vigliotti v. Kmart Corporation,* 680 So.2d 466 (Fla. 1st DCA 1996) mandates a reversal.

CONCLUSION

There was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant's injuries did not "arise out of" work performed within the course and scope of employment as required by Florida Statutes 440.02(36). Further, there was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant failed to prove injuries with medical certainty by objective findings as required by 440.09. Lastly, there was no competent substantial evidence for the JCC to deny temporary partial benefits where Claimant demonstrated a connection between his injuries and a loss of income. This court should therefore reverse the JCC's decision and award compensability, temporary partial disability benefits and future medical treatment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing document have been furnished via U.S. Mail

to the District Court of Appeal, First District of Florida, 301 Martin Luther King Jr. Blvd., Tallahassee, Florida 32399-1850, and one copy each to Roderic G. Magie, Esquire, Esquire, 25 W. Cedar Street, Suite 660, Pensacola, Florida 32501, on this 7th day of January, 2004.

/s/ [illegible]
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DISTRICT COURT OF APPEAL, FIRST DISTRICT
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December 30, 2003

CASE NO.: 1D03-2849
L.T. No.: 02-048703PNS

Michael Mcwilliams,
Appellant/Petitioner(s),

v.

Amstaff, Liberty Mutual Group
Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellee's motion filed December 11, 2003, for extension of time for service of an answer brief is granted. Appellee's answer brief filed December 23, 2003, is accepted as timely filed.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:
Michael J. Valen
Roderic G. Magie

bb

[SEAL]

/s/ Joh S. Wheeler
Jon S. Wheeler, Clerk

[TRANSCRIPT OF RECORD]

* * * * *

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dated November 5, 2002, denying the compensability of your workers' comp claim?

A. On November 5?

Q. You received a Notice of Denial dated November 5, 2002, notifying you that the employer/carrier had denied your workers' compensation claim?

A. Yes, I probably have.

Q. You did; did you not?

A. Yes.

Q. Thank you.

A. Well, I didn't receive that on November 5th.

Q. I didn't say that, sir. I said you received that —

A. I mean, they told me that was — I received it after that date at. some time, yes.

Q. Yes, sir, I would agree it would have probably been after November 5, 2002.

A. Yes.

Q. But you.. received it?

A. Yes.

Q. Okay, thank you. And you also received the Responses to the Petitions for Benefits dated November 27, 2002, and January of

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2003?

A. The Responses forte benefits that were denied, you mean?

Q. Yes.

A. Yes, uh-huh.

Q. You can sit thirty minutes at a time?

A. Uh-huh.

MR. VALEN: Out loud.

THE WITNESS: Yes.

BY MR. MAGIE:

Q. In fact, in your second deposition, which I took April 30, you told me you could sit two hours at a time; correct?

A. I can sit as long as it takes if I'm motivated. I will be in pain, but I can sit.

Q. And you can operate and do daily activities?

A. Yes, I can to a certain extent; yes, I can.

Q. You can stand two hours at a time?

A. Yes, I can.

Q. You can walk one hour at a time?

A. Yes.

Q. And you can drive one hour at a time

without too much trouble?

A. Yes. I will be in pain.

Q. But you do it?

A. Yes, I can do it, yes.

Q. Okay. You're currently holding off from further surgery as long as there is not a significant increase in your pain?

A. Yes. I am delaying it just because of some information I had of that type of surgery that Mr Lurate wanted to do, yes.

Q. You told me that you were holding off from further —

A. Yes.

Q. — surgery as long as —

A. Yes, if I can, yes —

Q. — it's not a significant increase —

A. Yeah, if I can; if it's not a significant —

COURT REPORTER: You're talking at the same time. I can't —

MR. VALEN: You're doing it again. You've got to wait until he stops, and then you start.

THE WITNESS: Okay.

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BY HR. HAGIE:

Q. Is that correct?

A. Yes.

Q. Now, are you aware that there a number of schools in the Escambia County school district that you could apply for work for, but you haven't?

A. Yes, uh-huh.

Q. And you're not looking for substitute teaching work?

A. No.

Q. As of April 30, when I took your last deposition, you had not applied for work in the Okaloosa County school dtstrict?

A. No, I have not.

Q. You bench press a hundred and twenty-five to two hundred and seventy-five pounds, do you not?

A. Yes, I do.

Q. And you told me in your deposition a coupl e of weeks ago you could do ten reps of a hundred and twenty-five pounds bench press?

A. Yes.

Q. And you did one or two — you could do two hundred and seventy-five pounds bench

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press once or twice?

A. Yes.

Q. And you continue to do that?

A. No, I just — I mean, I recently started it after Christmas, I started up, yes.

Q. Exactly. And you've been doing it ever since?

A. If I have the time. One day a week average I told you.

Q. And you did; you told me one day a week average you did it, yes, sir.

A. That's true.

Q. Are you aware that Doctor Lurate thinks you've improved significantly since you saw him November 26, 2002, if you can bench press two hundred and seventy-five pounds?

A. Well, I used to bench press four hundred and fifteen. If you're physically fit and used to doing that, two-seventy-five is light compared to four-fifteen.

Q. And in spite of your neck problem you can do it?

A. Yes, but there's no pressure there. It's not over my head.

MR MAGIE: Thank you. Those are my

questions at this time.

THE COURT: Mr. Valen.

MR. VALEN: I don't have anything further from this witness.

THE COURT: All right. Your next witness?

MR. VALEN: Anna Finney Broxson.

(Whereupon, a brief recess was taken, after which Ms. Broxson entered the hearing room and the following proceedings were had:)

THE COURT: Ma'am, please raise your right hand with me.

WHEREUPON:

ANNA FINNEY BROXSON,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VALEN:

Q. Please state your name.

A. Anna Broxson.

Q. Ms. Broxson, where are you currently employed?

A. Jay High School.

STATE OF FLORIDA
DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY
JUDGE OF COMPENSATION CLAIMS
DISTRICT "A" WEST

EMPLOYEE:
Linwood Allen Jones
One Geronimo Cr.
Pensacola, FL 32506

ATTORNEY FOR EMPLOYEE:
John L. Myrick
1457 N. Ninth Ave.
Pensacola, FL 32503

EMPLOYER:
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P.O. Box 87
Cantonment, FL 32533

ATTORNEY FOR E/C:
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CLAIM NO.: 265-04-0429

D/A: 10/28/99.

ORDER DENYING COMPENSABILITY
OF CLAIM AND PAYMENT OF MEDICAL EXPENSES

This cause came on for final hearing on June 6, 2001 in Pensacola, FL. Claimant seeks an Order granting the claim of Linwood Allen Jones compensable arising out of alleged job accident occurring on October 28, 1999, plus payment of related medical expenses, interest, attorney's fees and costs. The employer/carrier defenses are no accident or injury arising out of and in the course of employment, as "arising out of" is defined by F.S. 440.02(35) (1999); and in the altemative, an injury occasioned primarily by the willful intention of the employee to injure himself pursuant to F.S. 440.09(3) (1999). The employee/carrier denies payment of interest, attorney's fees and costs. The parties flied a Pretrial Stipulation (PTS) on April 23, 2001 as well as an employer/carrier Trial Summary. In addition to the stipulations contained in the PTS and amendments thereto, the following exhibits were introduced into evidence:

EMPLOYER/CARRIER EXHIBITS:

1. Deposition of claimant taken June 7; 2000.
2. Deposiflon of Dr. Peter Mannis taken May 31.2001.
3. Deposition of Dr. George Atwell taken May 31, 2001.
4. Deposition of Dr. Ian Rogers taken February 2, 2001.
5. Deposihon of Sherry Blanchard taken September 6, 2000.
6. Records from West Florida Hosnital with date of service of September 28 and 29, 1999.
7. Notice of Denial.

The Industrial Claims Court, District A-West, finds as follows:

1. This Court has jurisdicnon over the parties in this cause.

2. Claimant became employed with the predecessor of International Paper Company in 1981 when the operating company at the plant was St. Regis. As of October 28 1999, date of alleged job accident, claimant had been working in the Converting Department for 12 years. The work was a "swing shift" type of operation, and claimant went to work on October 28, 1999 at 6:30 p.m.

3. Claimant worked several hours on a routine basis. The first thing that occurred out of the ordinary was a telephone call from his wife at 8:00 p.m. or 8:30 p.m. For some months, claimant had experienced marital problems with his wife. As a result, claimant testified he restarted a relationship with Sherry Blanchard, a lady who claimant had dated in the past. During the marital crisis, claimant had moved in with Ms. Blanchard once or twice. Claimant and his wife discussed the couple's marital problems during this initial phone call for 10-15 minutes. Claimant then called Sherry Blanchard and discussed his impending divorce with her.

4. Sherry Blanchard advised claimant during the telephone conversation she planned.to come to the plant to talk with him in person. Claimant initially stated that she should

not come, but upon her insistence, told her that if it was very imponant he would meet her. Claimant testifies that he met Sherry Blanchard in the parking lot, leaving his assigned job post to do so.

5. While in the parking lot, claimant testified that he talked with Sherry Blanchard about another man Sherry Blanchard had been seeing while she was dating claimant. Sherry Blanchard admitted the relationship to claimant in the parking lot. As a result, claimant told Sherry Bianchard that their relationshin was over, that he had nothing else he wanted to say to her, and told her to leave.

6. Claimant went back to his work site. About five minutes later, according to claimant, Sherry Blanchard came to his work site uninvited and unescorted by any appropriate plant representative. Ms. Blanchard again confronted claimant to discuss his relationship with her. Claimant told her to leave a second time. Sherry. Blanchard left the job site for a minute or two and then came back. Upon Ms. Blanchard returning to claimant's work site the second time, claimant lost his temper with her and the couple argued for about five minutes at the job location. Claimant told Sherry Blanchard she had to go.

7. Claimant then took Sherry Blanchard by the hand and escorted her from his job site through the plant toward exit doors at the head of a flight of stairs whch would take claimant and Ms. Blanchard down to the first floor and out of the plant building on the way to the parking lot.

8. The exit doors involved are two swinging doors made of wood with a portion of the swinging doors containing glass through which to see. The glass is 1/4 inch thick with wire reinforcement. Claimant conceded the glass portion of the door was "pretty tough" with the chicken wire reinforcement in the glass.

9. As claimant approached the door, he thrust both hands forward to open the door. It was claimant's intent to slam the door open. As claimant's hands impacted the doors, the left hand hit the wooden portion of one door. The right

hand of claimant contacted the glass portion of one of the doors. The force of the impact caused claimant's right hand and arm to go through the glass, creating a hole at least five or six inches across.

10. Claimant was cut severely. He continued down the stairs with Ms. Blanchard, tried to wash off the blood in the locker room on the first floor, and wrapped up the wound. Claimant and Ms. Blanchard then traveled in Ms. Blanchard's car to West Florida Hospital Emergency Room for treatment.

11. At the West Florida Hospital Emergency Room, claimant was treated by Dr. Peter Mannis, emergency room physician. Dr. Mannis testified that claimant told Dr. Manstis he "tripped over his shoe laces and fell forward through a window at his home and sustained a deep laceration to his right forearm." Claimant testified at trial that he did tell Dr. Mannis he injured himself at home when presenting at the emergency room. In his discovery deposition, claimant stated he could not remember whether he told the doctor about being hurt at home. In a response to a question posed by his own attorney, claimant stated that he told the docror he had been Injured at home "out of pure stupidity." Claimant stated he wanted to "protect her (Sherry Blanchard) from getting — me getting in trouble at work for having her there and for her being there. I did not want her to be in trouble. This is the reason why I said what I did."

12. A co-employee of claimant on October 28, 1999, Frank Douglas Kahler, testified that claimant called him from some location during the night in question, stating that he had cut himself, that he might have to go to the hospital to get stitches, and that claimant had a "home emergency". Claimant stated he would not be back to work and to "put it in the book that way."

13. Prior to the call from claimant, Mr. Kahler had last seen claimant at the job site walking away from claimant's work position with a female friend. Mr. Kahler had seen this female companion with claimant at his job site earlier that evening. Prior to that, claimant approached Mr. Kahler

about whether Mr. Kahler wanted claimant to obtain something for Mr. Kahler to eat or drink. Claimant stated that he planned to obtain a milk shake or burger from a nearby Burger King off the plant grounds. Mr. Kahler declined the offer, and claimant left. Claimant came back somewhat later, seeming a little upset. Claimant told Mr. Kahler that he did not go to the Burger King as initially indicated, but decided to "swing by his lady friend's house and that he had caught her coming home with another gentleman and was unset and came back to work." Thereafter, the female friend in question showed up at claimant's work site, unescorted, according to Mr. Kahler. Mr. Kahler observed the couple from about 60 feet away, indicating that they "seemed to be in a stern discussion" which lasted about five minutes.

14. International Paper Company employee, Larry Andrews, supervisor of claimant on October 28-29, 1999, testified that he contacted claimant at home by telephone the momrng of October 29, 1999, after receiving a report that claimant had allegedly left work during his scheduled shift, had unauthorized visitors in his work area, and had destroyed company property. Mr. Andrews called claimant at his home at approximately 9:45 a.m. on October 29, 1999, and discussed the above allegations with claimant. John Smith, union representative, and Audrey Snow, human resource representative, were listening in on the speaker phone.

15. Claimant told Mr. Andrews and the others he was very sorry for the events of the previous evening. He said he was upset because his wife had called him at work that evening and told him she wanted a divorce. Mr. Andrews told claimant that he was suspended from work beginning the morning of October 29th until completion of an investigation. He asked claimant to meet him at West Florida Hospital later that day for a drug screening due to the "irrational behavior" that Mr. Andrews felt claimant had exhibited the night before.

16. Claimant met with Mr. Andrews at West Florida Hospital at 11:45 a.m. that date. On October 29,1999, claim-

ant underwent an evaluation by Mr. Buffington, emergency room physician and a counselor from the rehab center at West Florida Hospital.

17. During the investigation. Mr Andrews questioned claimant about drug use in coniection with the events ofthe evening before. Claimant denied drug use. Later in the invesugation, claimant was shown results from a lab anaysis of a urine sample. Upon being presented with the results, claimant stated that two weeks previously, claimant had been in Atlanta and smoked some marijuana. Mr. Andrews discussed with claimant the issue of a visitor being on the job site without prior approval by a supervisor. Claimant told Mr. Andrews that on the third occasion that Sherry Blanchard came to his job locanon, he became angry with her; he took her by the arm to escort her out of the department and when claimant got to the doors in question, "he forcefully was pushing out on the door, put his hand on the window and it broke." Mr. Andrews then testifled that in the 15 years he had been at the plant site, he had never seen anyone else break the glass whie opening the door claimant opened. Mr. Andrews stated that the proper procedure for claimant, when the girlfriend came to his job site uninvited and unescorted, is to call security so that security can escort the uninvited visitor off the premises.

18. The definition of what constitutes an accident arising out of employnient is statutorily set out at F.S. 440.02(35) (1999). That deflnihon states: "Arising out of pertains to occupational causation. An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death." The standard to determine compensability in this case appears to be whether the work performed by claimant in the course and scope of his employment is the major contribuing cause of his injury.

19. When viewed in the light of the statutory definition, claimant's actions which precipitated his injury appear to have as their majdr contributing cause the frustration and

admitted anger claimant was experiencing due to his marital problems, his learning of his girlfriend's "unfaithfuless" to him during the period that daimant had been dating Sherry Blanchard, and the insistence of claimants wife and Sherry Blanchard to discuss these volatile subjects with claimant the night in question. Claimant was escorting Sherry' Blanchard off the premises at the time of the injury, since he was aware that visitors should not be at job sites without previous clearance. Even assuming that it was appropriate for claimant to escort Sherry Blanchard out of the plant premises as opposed to security personnel that action does not amount to the major contributing cause of the injury. If claimant had simply been escorting Sherry Blanchard off premises because of work regulations, without the above referenced anger and frustrarion, it is extremely unlikely that claimant would have hit the door in question with his right hand so forcefully that it could have been driven throuhh wire reinforced 1/4 inch thick glass. As testified to by Larry Andrews, no one had hit that door that forcefully within the last 15 vears. See *Vigliotti vs. K-Mart Corporation* and *KM Administrative Seerice*, 680 So.2d 466 (FL DCA 1st 1996). It is therefore,

ORDERED AND ADJUDGED that the claim for compensability determination of the alleged job accident of October 28, 1999 and associated medical expense are denied and dismissed with prejudice.

DONE AND ORDERED in Chambers.

(SEAL)

/s/ [illegible]
Judge of Compensation Claims

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1DO1-3202

LINWOOD ALLEN JONES,
Appellant,

CHAMPION INTERNATIONAL and SEDGWICK JAMES,
Appellee.

Opinion filed April 11, 2002.

An appeal from an order of the Judge of Compensation Claims.

Michael J. Demarko, Judge.

John L. Myrick, Pensacola, for Appellant.

Millardd. Fretland, Conroy, Simberg, Ganon, Krevans & Abel, P.A., Pensacola, for Appellee.

PER CUMAM.

AFFIRMED.

BOOTH, BROWNING and POLSTON, JJ., concur.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

OJCC Case No.: 02-048703PNS

David W. Langham
Judge of Compensation Claims

District "A" West

D/A: 10/25/2002

DCA Case No.: 1D03-2849

Michael McWilliams,
Appellant,

vs.

AmStaff and Liberty Mutual,
Appellees.

APPELLANT'S INITIAL BRIEF

FOR APPELLANT:
Michael A Valen, Esquire
Florida Bar No.: 997633

THOMAS J. UEBERSCHAER, P.A.
601 N. Baylen Street
Pensacola, Florida 32501

PRELIMINARY SATEMENT

In this brief the appellant, Michael McWilliams, will be rererred to as "Claimant." The Appellees, AmStaff and Liberty Mutual, will be referred to as "employer/Carrier" or "E/C." All claims' adjusters for Liberty Mutual that handled Claimant's claims will be collectively referred to as "'Adjuster." The Judge of Compensation Claims will be referred to as "JCC." The Record of Appeals is in one volume. The pages in Volume I are numbered 1 trough 193. References to the Record will be denoted by the Volume number and the appropriate Page number, (V#:P#).

STATEMENT OF THE CASE AND FACTS

Claimant is a forty-three year old licensed teacher, with a B.S. degree in education and eleven years of teaching experience, who tauhht cabinet-making and drafting at Escambia Charter School. (I:9-12). During his entire teaching career, Claimant has never been disciplined or reprimanded for any reason. (I:11).

Escambia Charter School is a private school for at-risk youth, approximately forty percent of whom have been expelled from area public schools. (I:60). The president and CEO of Escambia Charter School, Mr. Stan Callender likened the school atmosphere to the movie "Dangerous Minds" because of the chaos and problems associated with gaining control of students. (I:67). Mr. Callender candidly admitted teacher retention at Escambia Charter School was not good. (I:70).

Ms. Anna Broxson taught mathematics at Escambia Charter School before quitting after a student threatened to kill her, and other students told her to "watch her back" (I:39). Ms. Broxson testified she witnessed students cursing, fighting and physicalty contacting teachers while employed at Escambia Charter School. (I:41-46) She regarded the school environment as unsafe for teachers. (I:39).

Mr. Randy Augustine was also a teacher at Escambia Charter School who quit his employment after "scuffling" with a student who initiated physical contact with him. (I:52) Mr. Augustine resigned because he was afraid of being hurt by a student. (I:56).

On October 25, 2002, student David Thompson jumped on Claimant's back from behind piggyback style piacing his hands around Claimant's neck while Claimant taught class. (I:18, 77-79). David Thompson hung from Claimant's back while Claimant asked him to let go and stop. (I:79, 80). Claimant, who wrestled in high school and college and who taught wrestling as a coach for ten years, initiated a split-second. wrestling move flipping student David Thompson over his neck in self defense. (I:19, 33). Claimant then

allowed the student to getm up telling him to stop playing before he got in trouble with the dean of students. (I:77). Student David Thompson, who was previously expelled from public school for assault and battery and possession of a weapon on campus, was also expelled by Escambia Charter School for five days because of this incident. (I:84, 85).

Claimant first reported the incident the following day to Escambia Charter School principal, Mr. Jerome Chisolm. (I:20). Mr. Chisolm testified that upon learning of Claimant's reported work injury he "heard it and just let it go because I thought, you know, maybe they were out there playing around. He said, when I tossed David over my head. And so I took that to mean that they were out there horse playing around." (I:98)

Claimant continued to experience neck pain and again reported the accident to Mr. Chisolm three days later who again failed to respond. (I:21). Later that week, because no paperwork had been provided to him for completion, Claimant notified Cindi Opachick of Amstaff, who is the staff payroll company that insures Escambia Charter School for workers compensation claims, of the incident, and requested medical care for the injury to his neck. (I:178). An appointinent was then scheduled for Claimant to see authorized physician, Dr. J. Ole Olsen, who released Claimant back to work with five pound lifling restrictions. (I:178, 179). Because the Claimant felt incapable of continuing to work in what he perceived to be an unsafenvironment with the inability to defend himself against students, he resigned his position as teacher on November 7, 2002. (I:179).

AmStaff filed a DWC-19 Notice of Denial on November 5, 2002 denying the claim in its entirety on the basis that Claimant was engaged in horse play and that his neck injury did not arise out of the course and scope of employment as a teacher at Escambia Charter School. (I:162).

Claimant thereafter sought treatment on his own on November 26, 2002 with board certified orthopedic surgeon. Dr. Barry Lurate. (I:124). Dr. Lurate testified that Claimant

presented with a history of teaching at a wayward school when he was jumped from behind by a student injuring his neck during the process of flipping the student off of him. (I:125). Dr. Lurate on physical examination noted pain radiating down the right shoulder and tingling in Claimant's hand, (I:125) and diagnosed cervical herniated disks at C4-5 and C5-6. (I:126). Dr. Lurate indicated Claimant had not yet reached maximum medical imprqvement and assigned restrictions to avoid overhead use of his right arm or looking upward. (I:128,129). Dr. Lurate further testified within a reasonable degree of medical certainty that the injury mechanism as described by Claimant was consistent with the injuries he diagnosed (I:129) and further testified that if Claimant failed to improve he would be a candidate for an anterior cervical decompression and fusion at C4-5 and C5-6. (I:127).

A final merits hearing was conducted on May 14, 2003 on the issue of compensability, temporary partial disability benefits from accident date October 25, 2002 forward as well as authorizatlon ofa treating physician. (I:173). On June 13, 2003 the Judge of Compensation Claims issued an Order ruling that although Claimant had not "abandoned his job duties", or deviated from his teaching duties at the time of injury to such ah extent as to constitute horse play, the Claimant was nonetheless not within the course and scope of his employment when the injury occurred and denied compensability based on Florida Statutes 440.02(36). (I:173-187). Further, although expressly determining that physical contact initiated by students was reasonably foreseeable, (I:183) and that Claimant's actions to remove the student from his neck and hack was only a momentary departure from his job duties and did not rise to the level of "abandonment of employment", (I:85) the JCC nonetheless denied compensability in its entirety on the basis that the work performed was not the major contributing cause of Claimant's injuries as is required by Florida Statutes 440.02(36). This appeal follows. (I:173-189).

SUMMARY OF ARGUMENTS

There was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant's injuries did not "arise out of" work performed within the course and scope of employment as required by Florida Statutes 440.02(36). Further, there was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant failed to prove injuries with medical certainty by objective findings as required by 440.09. Lastly, there was no competent substantial evidence for the JCC to deny temporary partial benefits where Claimant demonstrated a connection between his injuries and a loss of income.

ARGUMENT

I. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSABILITY CLAIMS TO DENY COMENSABILITY ON BASIS THAT CLAIMANT'S INJURIES DID NOT "ARISE OUT OF" WORK PERFORMED WITHIN THE COURSE AND SCOPE OF EMLOYMENT AS REQUIRED BY SECTION 440.02(36).

Although the Judge of Compensation Claims expressly determined that Claimant had not "abandoned his job duties" or deviated from his employment to the extent he was engaged in horse play, the JCC nonetheless erred in deteimining Claimant was not acting within the course and scope of employment when he was physically assaulted by a student while engaged in his normal duties of teaching class to troubled youth. "I find that competent substantial evidence does not support that the Claimant was in course and scope of employment when injury occurred." (I:180). Further, although the JCC expressly determined that physical contact initiated by students upon teachers was reasonably foreseeable, (I:183) the JCC erred by concluding instead that Claimant's "impermissible physical reaction" to being jumped from behind by a delinquent student was the major contributing cause of his injuries.

Vigliotti v. Kmart Corporation, 680 So.2d 466 (Fla. 1st DCA 1996) sets forth a two part test for deteemining com-

pensability in post-1994 workers compensation cases: 1) The claimant must have been peerforming work in the course and scope of his employment, and 2). the work performed by the claimant must be the major contributing cause of the claimant's injury. *Id.* at 467. In *Vigliotti*, the appellant claimant was a door greeter for Kmart who was injured when she slipped and fell after clocking out but before she had left the premises of the store. In response to appellee's argument that the new definition of arising out of under Section 440.02(32), Fla. Stat. (Supp. 1994) required appellant to prove a causal link between an employee's actual work function and the injury, i.e., "the work performed" must be the "major contributing cause" of the injury, this court explained: "We see nothing, however, in the extensive revisions to the workers compensation law to indicate the legislature intended to broaden tort liability of employers in this fashion as a solution to the workers compensation crisis." *Id.* at 467. The court noted that such an interpretaflon of the phrase "arising out of" as advocated by the appellees, would necessarily limit compensability to those injuries occurring during the performance of only primary job duties thereby broadening the potential tort liability for every employer in Florida. *Id.* at 467. Moreover, this court noted such construction would contravene the legislative intent to ensure the prompt delivery of benefits to the injured worker by an efficient and self-executing system.

In the instant case the JCC erred in concluding it was Claimant's physical reaction to the assault which was the major contributing cause of Claimant's injuries. Although the JCC in the instant case expressly determined that the danger to teachers from unprovoked attacks by students was foreseeable, (I:183) by concluding that Claimant's "physical reaction" to a student assault was the major contributing cause of his injuries, the JCC has inadvertently exposed the employer in the instant case to tort liability in contravention to the admonitions of *Vigliotti*. Because the Claimant in the instant case was on the employer premises fulfilling his essential job function of teaching delinquent students when

he was assaulted from behind without warning, and further because such unwelcome physical contact was foreseeable and within the increased zone of risk for teachers employed at Escambia Charter School, the JCC erred in denying compensability and determining Claimant' injuries did not arise out of or occur within the course and scope of his employment. *See, also, Tanguilan v. PMI Employee Leasing*, 832 So.2d 176 (Fla. 1st DCA 2002) holding claimant's employment was major contributing cause of his injuries under 440.02(35) where he only momentarily deviated from employment when he lit explosive device while waiting to clock out at the end of the shift. *See, also Orange County MIS Dept. v. Hak*, 710 So.2d 998 (Fla. 1st DCA 1998) holding there may be numerous contributing causes leading to an injury but claimant must establish that the employment~occurrence is the most preponderant cause of the injury.

In the instant case, the most preponderant cause of Claimant's neck injury was simply the act of teaching delinquent students there the risk of being assaulted was a foreseeable part of the job. Because Claimant was performing the essential functions ofhis empploment when the injury occurred the JCC erred in concluding Claimant's injury did not arise out of or occur within the course and scope of employment pursuant to Section 440.02(36).

II. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSATION CLAIMS TO DENY COMPENSABILITY ON BASIS THAT CLAIMANT FAILED TO PROVE HIS INJURIES WITHIN MEDICAL CERTAINTY BY OBJECTIVE FINDINGS AS REQURED BY SECTION 440.09 FLORIDA STATUTES.

On the one hand, the JCC expressly determined that the major contributing cause of Claimant's injuries was his own impermissible act of "throwing David Thompson over his shoulder," in response to being jumped by: the student from behind. "A critical issue is whether Claimant's actions, in causing injury to himself by throwing David Thompson over his shoulder is a deviation from employment as contem-

plated by F.S. 440.02(36)." (I:179). "The fact that Claimant reacted impermissibly and inappropriately to conduct of a stadent is the major contributing cause of the injury." (I:180). However, in the same breadth when challenging the factual predicate of Dr. Lurate's medical opinions on causation, the JCC characterizes Claimant's physical reaction as a failed attempt to grab the student with no evidence Claimant lifted him over his head during the act. (I:181). These two factual characterizations of Claimant's action are inconsistent. Nevertheless, Dr. Lurate testified that the history provided by Claimant was consistent with the injuries he diagnosed Claimant as sustaining.

> "Q: When did you first see Mr. McWilliams, doctor, and what was the history that he presented to you?
>
> A: I have seen him one time, it looks like on November 26, 2002, and the history I got was that. - - I guess, he is a teacher at this wayward school - - or school for wayward kids - - and one of the students jumped him from behind, and in the process of flipping the student off of him, he felt this tearing sensation in his neck, with increased neck pain, and I think, at some point along the way, developed some pain down his arm - - right upper extremity - - originally, treated through workers' comp." (I:125).
>
> Q: Was the injury mechanism, that Mr. McWilliams described to you, a reasonable explanation for the condition you diagnosed and provided treatment?
>
> A: I think it was reasonable.
>
> Q: In other words, within a reasonable degree of medical certainty, was the event that he described, having occurred on October 25, 2002 - - when he flipped the student off of him - - is that, in your estimation, the major cause of the condition that you diagnosed?
>
> A: From what I have to work with, I would say I have no reason to doubt it. It's compatible. (I:129).

Defense counsel questions on cross-examination:

> Q: Okay, and when you use the phrase "flipping him" - - the student, that is - - "overhead," how did you

visualize the mechanism that Mr. McWilliams described to you?.

A: I am envisioning somebody is on my back - - you know, maybe arms around my neck, around my shoulder - - and I kind of reach behind myself, to grab him and shake him, flip him overhead, off of me.

Q: Okay, in other words, over your front, so to speak?

A: Or off to the side or, you know, any way to flip him off of there.

Because the JCC expressly determined that Claimant injured himself when he threw student David Thompson "over his shoulder" (I:179), Dr. Lurate's opinions regarding causation were premised on an accurate factual history when be opined that Claimant sustained herniated disks in his cervical spine when he flipped the student off his back. *Uliman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st DCA 1993) holding not every error or omission in the factual predicate upon which an expert bases an opinion necessarily justifies disregarding that expert's oninion. See, also, Closetmaid v. Sykes 763 So. 2d 377 (Fla. 1st DCA 2000) holding JCC's determination of reasonable medical certainty depends on the substance of the evidence rather than the use of "reasonable medical certainty", terminology, or any other so-called "magic words", by a medical witness. *Id.* at 382.

There was therefore no competent substantial evidence for the JCC to deny compensability on the basis that Claimant failed to prove his injuries with medical certainty by objective findings as required by Section 440.09.

III. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSATION CLAIMS TO DENY TEMPORARY PARTIAL BENEFITS WHERE CLAIMANT DEMONSTRATED A CAUSAL CONNECTION BETWEEN HIS INJURIES AND A LOSS OF INCOME.

In order to prove eligibility for temporary partial disability benefits, a claimant must simply show a connection between his injuries and loss of income. *Jefferson v. Wayne Dalton Corporation*, 793 So.2d 1081 (Fla. 1st DCA 2001). In

the instant case, Dr. Olsen released Claimant back to work with five pound lifting restrictions. (I:178, 179). Dr. Lurate diagnosed Claimant as suffering from herniated disks at C4-5 and C5-6, and testified that if Claimant's condition did not improve he would be a Candidate for an anteriol cervical decompression and fuision at two levels. (I:127). Further. Dr. Lurate imposed restrictions to avoid heavy lifting with his right arm, no repetitive overhead use of the right arm, no overhead work in general, and in fact restricted Claimant to avoid work where he would be required to tilt his head up. (I:12.9). Although the JCC, relying upon the testimony of Stan Callender, determined that Claimant could have returned to work at Escambia Charter School within those restrictions, the record is devoid of any such evidence. In fact to the contrary, the first day after returning to work following his injury Claimant was required to pressure wash the building in clear violation ofthe restrictions imposed by both physicians. (I:21-23). Furthermore, after leaving employment at Escambia Charter School the Claimant conducted an extensive work search and in fact earned approximately two thousand dollars through variqus self-employed jobs. (I:25, 26). The JCC's cynical comparison of the Claimant's work search with the fact that teacher Anna Broxson found employment almost immediately upon leaving Escambia Charter School ignores the fact that Claimant sustained serious on the job cervical injuries before quitting his employment whereas Anna Broxson fortuitously did not.

The JCC therefore erred in denying temporary partial disability benefits to Claimant where he demonstrated through a good faith work search the connection between his loss of income and injuries.

CONCLUSION

There was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant's injuries did not "arise out of work performed within the course and scope of employmept as required by Florida Statutes 440.02(36). Further, there was no competent substantial evidence for the JCC to deny compensability on the basis that

Claimant failed to prove injuries with medical certainty by objective findings as required by 440.09. Lastly, there was no competent substantial evidence for the JCC to deny temporary partial benefits where Claimant dembostrated a connection between his injuries and a loss of income. This court should therefore reverse the JCC's decision and award compensability, temporary partial disability benefits and future medical treatment.

FOR THE FOREGOING REASONS, the Appellant respectfully requests this Court to reverse the JCC's Final Compensation Order of June 13, 2003 and grant Apellant's Motion for Appellate Attorney Fees.

Respectfully submitted,

/s/ [illegible]
Michael J. Valen, Esquire
Florida Bar No.: 997633

THOMAS J. UEBERSCHAFR, P.A.
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(850) 434-8778
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing document have been furnished via. U.S. Mail to the District Court ot Appeais, First District of Florida, 301 Martin Luther King Jr. Blvd., Tallahassee, Florida 32399-1850, and one copy to Roderic C. Magie, Esquire, Esquire, 25 W. Cedar Street, Suite 660, Pensacola, Florida 32501, on this 25th day of November, 2003.

/s/ [illegible]
Michael J. Valen

APPENDIX B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

December 12, 2003

CASE NO.: 1D03-2849
L.T. No.: 02-048703PNS

Michael Mcwilliams
Appellant/Petitioner(s),

v.

Amstaff Liberty Mutual Group
Appellee/Respondent(s).

BY ORDER OF THE COURT:

The parties' stipulation correcting and supplementing the record filed December 10, 2003, is treated as a motion to supplement the record on appeal with the order denying compensability of claim and payment of medical expenses dated July 9, 2001, the opinion filed April 11, 2002, in case number 1D01-3202, and pages 48-53 of the transcript of the final merits hearing dated May 13, 2003, and is granted Counsel for appellant shall ensure preparation and transmittal of the supplemental record within 30 days from the date of this order.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order:

Served:
Michael J. Valen
Roderic G. Magie
Hon. David W. Langham

am

/s/ Jon S. Wheeler
Jon S. Wheeler, Clerk

[SEAL]

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

October 30, 2003

CASE NO.: 1D03-2849
L.T. No.: 02-048703PNS

Michael Mcwilliams
Appellant/Petitioner(s),

v.

Amstaff Liberty Mutual Group
Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed October 17, 2003, for extension of time for service of the initial brief is granted. Appellant's brief shall be served on or before December 1, 2003.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:
Michael J. Valen
Roderic G. Magie
bb

/s/ Jon S. Wheeler
Jon S. Wheeler, Clerk

[SEAL]

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
OJCC Case No. 02048703PNS

Michael McWilliams
Claimant,

vs.

AmStaff Human Resources and
Liberty Mutual Group

FINAL ORDER DENYING COMPENSABILITY OF CLAIM, PAYMENT OF TEMPORARY INDEMNITY BENEFITS, AND AUTHORIZATION OF SURGERY/TREATMENT WITH AN ORTHOPEDIST

THIS CAUSE was heard before the undersigned at Pensacola, Escambia County, Florida on May 14, 2003 upon the Claimant's claims for compensability, temporary partial disability benefits from the accident date of October 25, 2002 and continuing, as well as authorization of a treating physician. The petition for benefits were filed November 27, 2002 and January 21, 2003. Mediation occurred on February 21, 2003 (86 days after the initial petition was filed), and a pretrial compliance questionnaire was filed April 3, 2003. The final hearing occurred one hundred sixty-eight (168) days after the initial petition was filed. Present in Pensacola, on behalf of the Claimant was Michael Vaten, Esq. Present in Pensacola on behalf of the Employer/Carrier (hereafter "E/C") was Roderic Magie, Esq.

Each party submitted a Trial Summary pursuant to Rule 4.085(c)(U.P.P.).

Submitted into evidence at the Final Hearing were the following documents, each accepted and placed into evidence without any objection except where noted, as joint exhibits, Claimant's exhibits, or E/C exhibits, with each individual exhibit being further identified by a numerical designation as follows:

JOINT EXHIBITS:

1. The deposition of Dr. R. Barry Lurate was marked as Joint exhibit "1" and accepted as evidence.

EMPLOYER/CARRIER EXHIBITS:

I. The Claimant's resignation letter was marked as E/C exhibit "1" and accepted as evidence.

2. Notice of Denial dated November 5, 2002 was marked as E/C exhibit "2" and accerted as evidence.

3. Response to Petition for Benefits dated November 27, 2002 was marked as E/C exhibit "3" and accepted as evidence.

4. Response to Petition for Benefits dated January 27, 2003 was marked as E/C exhibit "4" and accepted as evidence.

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

1. The parties pretrial compliance questionnaire filed April 2, 2003 was marked as Judge's exhibit "1" for the record.

2. The Trial Summary of the Claimant filed May 12, 2003 was marked as Judge's exhibit "2" for the record.

3. The Trial Summary of the E/C filed May 12, 2003 was marked as Judge's exhibit "3" for the record.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolved this claim. I have not attempted to painstakingly summarize the substance of parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me, and the live testimony of the witnesses who appeared before me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based on the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. Any and all issues raised by way ofthe PFB's, but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant and, therefore, are Denied and Dismissed with prejudice, See *Betancourt vs. Sears Roebuck &. Company Co.*, 693 So.2d 253 (Fla. 1st DCA 1997).
3. Claimant was a teacher at Escambia Charter School (the "employer" herein) starting in July of 2002. He was hired as a cabinet maker to teach students cabinet making and drafting, and also did some maintenance work. His teaching assignments included six classes, including two drafting classes, a DCT class, and two construction classes. Escambia Charter School is designed for at-risk high school students, "at risk" being defined by the school's president and CEO, Stan Callendar, as applying to any student that has a GPA of 2.0 or less, or is credit deficient for age level and grade level. Mr. Callender further testified that as many as forty percent of the student population had been expelled from other ptiblic schools, and that the remainder are at the school as a result of parent choice. The evidence supports that the environinent at the Employer was different from that prevailing at most high schools. I find that the evidence supports that a percentage of students there were discipline problems and that this was known to the management and the teachers.
4. The Claimant was allegedly injured on October 25, 2002. The facts of that occurrence are in some dispute. Claimant testified that on October 25, 2002 a student, David Thompson, poked him in the right shoulder. Claimant testified that his response was to grab Mr. Thompson's hand. Mr. Thompson testified that he approached Claim-

ant during the class in question and told claimant he was "soft." Mr. Thompson's account supports that Claimant did more than "grab" Mr. Thompson's arm. According to Mr. Thompson, Claimant's response was to grasp Mr. Thompson's arm and twist it until Mr. Thompson was brought down to tile ground. Student Justin Godwin's testimony confirmed Mr. Thompson's description. I accept that Mr. Thompson and Mr. Godwin's account of this is the more credible and believable. Claimant's attempt to minimize his reaction (and omit the "twisting" sufficient to bring Mr. Thompson to the ground) to this provocation by Mr. Thompson causes me to doubt Claimant's credibility somewhat. Mr. Thompson testified that Claimant then told him to stop playing before they got in trouble.

Later that afternoon the incident which is the subject of this claim occurred. At that time Mr. Thompson approached Claimant from behind without warning, and according to Mr. Thompson he jumped on Claimant's back, Claimant tried to lift him off of the ground (though Mr. Thompson did not believe be was ever off the ground); reached behind himself to try and grab Mr. Thompson, and when he could not free himself, then he said to Mr. Thompson "let go," "stop," and that was enough "horse playing, for us to stop before we get wrote up." Mr. Thompson re-enacted part of this in the final hearing, during his testimony. Mr. Thompson testified that when Claimant asked him to stop, after first trying to physically react to being grabbed, that Mr. Thompson just let go and that was it. Claimant characterizes the later events as occurring when he was "restraining" a troubled student who grabbed him from behind. Claimant testified that be was grabbed from behind by Mr. Thompson and so Claimant "hit him with a wrestling move as soon as he hit me and brought him tip over my head and held him there and just laid him down." Claimant says that he "stopped it (the move) right in mid air and slowed it down . . . I just dropped

him down." Claimant said that this action occurred rapidly, in split-second. Claimant denied saying anything from the point where Mr. Thompson grabbed him until Claimant had placed Mr. Thompson on the ground. Mr. Freddie Augustine was also a teacher at the Employer. On the date of this incident, Mr. Augustine saw Mr. Thompson "just came over and grabbed him by the arm," and Claimant "told him to leave or go, or something of that sort." Mr. Augustine did not recall seeing Claimant "throw a wrestling maneuver unto the student." Claimant's account of this second "grabbing" incident is at odds with Mr. Thompson's testimony and is not supported by Mr. Augustine, another teacher who was present, and who cannot recall Claimant lifting Mr. Thompson over his head. I find that such a display (holding a teenager over your head) would be noticeable and at least somewhat memorable, and find it persuasive that another teacher who was present does not recall it occurring. However, it is also persuasive that Mr. Chisolm (see below) recalls Claimant telling him the next day that he lifted Mr. Thompson over his head. This temporally proximate rendition of this description supports that Claimant has rendered a consistent descripton of his perception of the facts since the incident. Considering all of the evidence and weighing credibility, I find that the weight of the testimony support's Mr. Thompson's version of the facts of the "grabbing" incident which is the subject of this claim. While Claimant resisted the grab and tried to free himself, I find that be did not lift Mr. Thompson over his head and set him down as attested by Claimant.

The witnesses' testimony is consistent in establishing that this grabbing occurrence was shortly before the bell for the end of the school period and coincidently the end of the school day. When Claimant went to the school office that afternoon, there was no one present to whom he could report the incident. The next day, a Saturday, Claimant and the Principal of the school, Mr. Jerome Chisolm, were both present on Sat-

urday morning for a scheduled event. Claimant approached Mr. Chisoim, and told him that "David (Mr. Thompson) was goofing around and jumped on me," and hurt my neck. Mr. Chisolm testified that on Saturday morning Claimant "casually said that he had hurt his neck from the day prior from throwing David Thompson over his head." At that time, Claimant did not report that he had been "attacked" or "assaulted." At trial Claimant characterizes the incident as being "attacked" by Mr. Thompson. Mr. Chisolm concluded from Claimant's description of the activity that Claimant and Mr. Thompson were engaged in horseplay and that the event was not work related.

5. The principal of Escambia Charter School, Mr. Jerome Chisolm, also testified that it was not uncommon for students to use profanity, engage in horseplay, and generally act up in class.

However, Mr. Callendar denied that horseplay has been a problem at the Employer. Mr. Chisolm testified it was against school policy for both teachers and students to initiate physical contact with one another. That policy was known to the teachers and had been discussed in an earlier meeting of the teachers. Ms. Anna Broxson, a former teacher at the Employer, testified that she witnessed numerous occasions of students initiating physical contact with teachers. She testified that she wrote up disciplinary reports on several of the students on a regular basis for violations of school policies. Claimant also testified that he had written students up. In addition to the school policy discussion at this meeting, Claimant had been specifically talked to about touching students. That conversation arose when Claimant had expressed frustration about the students and intimated that he had felt like "swinging" on one. In that conversation, the school leadership specifically counseled Claimant not to strike or touch a student, and cautioned him of the possible consequences, legal and otherwise, of doing so. All of the knowledgeable

witnesses confirm this. Claimant knew not to touch students, and to refrain from a physical reaction if such occurred. On previous occasions, Claimant had acted appropriately when a student had touched him, telling the student to stop or go away. The testimony of Ms. Broxson, Mr. Augustine, Mr. Callendar and Mr. Chisolm, and Claimant himself clearly demonstrated this knowledge. Horseplay between students and teachers was not allowed or condoned at Escambia Charter School. Claimant knew the proper approach to David Thompson, in response to Thompson's touching of him, was to tell him to stop and not physically react.

6. The following Monday, Claimant was still in pain and complained again to Mr. Chisolm, and expressed doubts about his ability to work that day. Later that week, because no paperwork had been provided to him for completion, Claimant notified Cindi Opachick of AmStaff, who is the staff payroll company that insures Escainbia Charter School for workers' compensation claims, of the incident and requested Medical care for the injury to his neck. An appointment was then scheduled for Claimant to see authorized physician, Dr. J. Ole Olsen, who released Claimant back to work with five pound lifting restrictions. Because the Claimant felt incapable of continuing to work in what be perceived to be an unsafe environment with the inability to defend himself against students, he resigned his position as teacher on November 7, 2002.

7. A critical issue is whether claimant's actions, in causing injury to himself by throwing David Thompson over his shoulder is a deviation from employment as contemplated by F.S.440.02(36) ("Arising out of" pertains to occupational causation. An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death.). A occurrence similar to that is this case, where emotions got the better of reason, is set forth in *Linwood Allen Jones vs. International Pa-*

per Company/Sedgwick James, a District A-West case affirmed by the First District Court of Appeals (a copy of that compensation order and the Appellate Order affirming same are attached hereto and incorporated by reference). In the Order Denying Compensability of Claim arid Payment of Medical Expenses dated July 9, 2000, Jones was found to have been engaged in what was admittedly a part of his job, escorting an uninvited visitor to Jones' work station off the premises. The major contributing cause of the injury to Jones, however, was his anger and frustration at the uninvited visitor, a girlfriend, which anger and frustraflon caused Jones to use excessive force in opening a swinging door through which he and the guest had to exit the premises. Jones projected his right hand with such force that he drove it through the wire enforced one quarter inch glass in the door, severely injuring himself. That action of thrusting his hand through the glass was only a momentary or fleeting deviation from an appropriate job function of escorting the visitor. The Order was appealed and affirmed on a *Per Curiam* basis by the First District Court of Appeal. In the instant case there is a similar coupling of routine job actvities with an un permitted, excessive use of force against a student, causing injury to the teacher. The fact tbat claimant was in a classroom setting, monitoring and supervising students, including unruly students, is not the major contributing cause of the injury.

The fact that Claimant reacted impermissibly and inappropriately to conduct of a student is the major contributing cause of the injury (except for the absence of competent medical opinion testimony to establish the causation, see below). If Claimant had sent Mr. Thompson to the Dean after he was poked in the shoulder and called "soft," the second incident would not have occurred. If claimant had not reacted physically to a student putting his arms around the teacher, but had simply told the student to desist, the injury would not

have occurred. *City of North Bay Village vs. Millerick*, 721 So.2d 1230 (Fla. 1st DCA 1998). This is supported by the credible testimony of Mr. Thompson that when Claimant did ask that he let go, Mr. Thompson immediately did so. Being injured on the premises of the employer is not controlling as to an injury being compensable. *Madden vs. Walt Disney World Company*, 711 So.2d 150 (Fla. 1st DCA 1998); Admittedly, Claimant's action in attempting to free himself was momentary. However, it was no more momentary than the actions in *Jones*, and was a continuation of his earlier inappropriate behavior. I find that the competent evidence does not support that the Claimant was in the course and scope of his employment when he injury occurred. On the basis of lack of substantial competent evidence, I deny the compensability of the claim under F.S. 440.02(36).

8. Claimant says that when he was grabbed, he lifted Mr. Thompson overhead and set him down, injuring his own neck. This testimony is consistent with what he told his supervisor the next morning, and with the history be later provided to Dr. Lurate. I have observed he demeanor of the witnesses and I conclude that Claimant did not lift Mr. Thompson over his head and set him down (see above). Dr. Lurate recorded a history of Claimant being grabbed from behind, bending down, and "lifting the student over my head." Dr. Lurate concluded from his examination, review of diagnostic tests, and the history provided by Claimant that the incident was the major cause of the Claimant's right C4-5 and C5-6 herniated disc. The determination of major contributing cause is a legal determination upon which expert medical evidence may be persuasive. *Closet Maid v. Sykes*, 763 So.2d 377 (Fla. 1st DCA 2000). Clearly "[c]ausation of non-observable injuries is essentially a medical question." *Lindsay v. TVS Trucking Co., Claims Center*, 565 So.2d 864 (Fla. 1st DCA 1990); *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st

DCA 1993). I find the causation of injury to be questionable in this case because the history (lifting a student overhead) which Claimant provided to Dr. Lurate and which he rendered at trial is not credible or believable. Where the factual predicate is flawed, the opinion maybe rejected. *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st DCA 1993). The Court held "Of course not every error or omission in the factual predicate upon which an expert bases an opinion necessarily justifies disregarding that expert's opinion. On the other hand, some facts are so critical to the validity of the opinion as to dictate the opposite result, namely, rejection of the expert opinion. In a given case, therefore, the question ultimately will resolve itself into a judgment call by the trier of fact; and, on review, the exercise of this judgment should be entitled to the same presumption of correctness as other factual conclusions made by the trier of fact, and should not be reversed except upon a showing of abuse of discretion.)" In *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 863 (Fla. 1st DCA 1993), the requirement of asking the expert what effect the misrepresentations or flaws would have had on her/his opinion(s), was also rejected. Instead, *Ullman*, the Court adopted for workers' compensation cases, and applied, the standard for civil cases enunciated by the Florida Supreme Court in *Easkold v. Rhodes*, 614 So.2d 495 (Fla. 1993), According to this standard, the Office of the Judge of Compensation Claims is not compelled to accept the conclusions of the expert(s) where that opinion or conclusion is not supported by a proper factual predicate. Dr. Lurate was not asked what his opinion was regarding the causation of Claimants neck complaints assuming the Claimant resisted and tried to grab Mr. Thompson (and failed), but did not lift Mr. Thompson over his head. Because I find the credible evidence does not support the factual history provided to Dr. Lurate, I find that the causation of Claimant's injuries has not been proven to a reasonable degree of medical certainty by objective medi-

cal findings as required by Fla. Stat. §440.09. I have considered all of the evidence in reaching this conclusion, including the lay testimony of the onset of pain. However, the only testimony of the onset of pain/symptoms is that of Claimant (whose testimony regarding the lifting of the student overhead I have already determined to lack credibility). On the basis of the lack of competent expert testimony, based upon an accurate history of the facts of the incident to establish causation to a reasonable degree of medical certainty, I would deny compensability of this claim.

9. The E/C asserts that Claimant was engaged in horse play and that the horse play caused the injury. The "horse play" doctrine operates to deny compensation to an employee, who, although at work, engages in playful activity that is substantial enough to amount to a deviation from employment. *Times Publishing Co. vs. Walters*, 382 So.2d 720 Fla. 1st DCA 1980). *Walters*, sets forth the factors to be considered in determining whether an employee's horseplay is substantial enough to preclude compensability. These are (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (whether it involved an abandonment of employinent duties), (3) the extent to which similar activity had either been forbidden or had become an accepted or tolerated practice, and (4) the extent to which the horseplay may have been expected or reasonably foreseeable. The extent of the deviation is a key inquiry. *Times Publishing Co.* involved a momentary deviation without obvious danger, which occurred during a lull in work with no abandonment of employment duties. The extent of deviation (1) in this case was substantial. Claimant clearly violated the school policy against physical contact with students, and with the earlier arm twisting he risked causing injury to the student whose care and supervision he was charged with. The completeness of the deviation (2) is a more difficult question. Claimant bad not abandoned his job

duties, was not ignoring the other students, and did not leave the area his class was in. The practice of touching students was clearly impermissible and all of the teachers clearly knew that. Teachers testified that students touching them was also clearly not permitted and that students were written up and disciplined for such touching. Although Mr. Callendar testified that "horse play" was not a problem at the school, it was a problem with Claimant. In spite of this, however, the Employer had not disciplined Claimant in any significant way (beyond some verbal counseling in conjunction with discussion of other matters). Claimant did not discipline Mr. Thompson when he was poked, but instead responded in kind and twisted Mr. Thompson's arm, somewhat violently. Mr. Thompson was left with the impression that they were "playing" around and that it was permissible as long as the Dean did not catch them. Claimant did not enforce order, and then send Mr. Thompson to the dean or write him up, or otherwise discipline him for the poking. The touching of Claimant (poking) by this student, and the reciprocal touching of the student (twisting) by Claimant was accepted by each, in violation of the school rules. I find that the similar activity (3) was clearly forbidden. The instances of past touching, for which students had been disciplined or written up, were supported by various evidence from teachers and management. Therefore, while not accepted or tolerated, the evidence supports that such physical contact was reasonably foreseeable (4).

Thus of the four factors enunciated in *Times Publishing Co.*, the extent of the deviation and forbidden factors each support a finding of horseplay. Similarly, the completeness and the forseeability factors support a finding of this deviation not constituting horseplay. Thus the question of whether this incident amounts to horseplay is a close question. Claimant's reaction was neither appropriate nor professional. Claimant's reac-

tion was a deviation from his teaching duties, as confirmed by Stan Callendar, president and CEO of the school, as well as Jerome Chisolm. Although the deviation was brief, the failure to adopt a rationale approach to the situation is the proximate cause of claimant's injury.

Claimant argues that the horse play question is controlled by *Dunlevy v. Seminole County Dept. of Public Safety*, 792 So.2d 592 (Fla. 1st DCA 2901). There, the JCC denied compensability of an injury because it was sustained during horseplay. The claimant was a firefighter who had engaged in "roughhousing" with a fellow employee as the claimant was going off duty and the other was coming on duty. The Court of Appeal reversed the JCC's finding that the claimant's claim was not compensable because of roughhousing. As noted by the Count in *Dunlevy* in addressing the issue of deviation

> We conclude that these facts are more consistent with case law in which the courts have found that a momentary deviation from work duties does not rise to the wholesale abandonment necessary to bar a claim based upon the doctrine of horseplay. See, e.g., *Boyd v. Florida Mattress Factory, Inc.*, 128 So.2d 881 Fla. 1961); *Jean Fluet, Inc. v. Harrison*, 652 So.2d 1209 (Fla. 1st DCA 1995); *B & B Cash Grocery Stores v. Wortman*, 431 So.2d 171 Fla. 1st DCA 1983); *Times Publ'g Co. v. Walters*, 382 So.2d 720 Fla. 1st DCA 1980). *Dunlevy, supra* at 594.

Claimant asserts that injuries arising even out of one's own "stupidity" are compensable. A lack of common sense has not been a complete defense in this area of workers' compensation law. *Jean Fluet, Inc. v. Harrison*, 652 So.2d 1209 (Fla. 1st DCA 1995). See also, *Tanguilan v. PMI Employee Leasing*, 832 So.2d 176 (Fla. 1st DCA 2002) (holding that a claimant who only momentarily deviated from his employment when he lit an explosive device while waiting to clock out at the end of his shift was compensable).

The E/C asserts that the "horse playing" engaged in by Claimant in this case is not the type of "horse play" which occurs in "clocking out" and "enforced lull" time cases, which generally are considered minor deviations and, therefore, compensable. *See generally, Tanguilan vs. PMI Employee Leasing*, 27 Fla. Law Weekly D2494; *Dunlevy vs. Seminole Couny Dept. of Public Safety*, 792 So.2d 592 (Fla. 1st DCA 2001). "Enforced lull time" cases include: *Times Publishing Co. vs. Walters*, 382 So.2d 720 (Fla. 1st DCA 1980); *B & B Cash Grocery Stores vs. Wortman*, 431 So.2d 171 (Fla. 1st DCA 1983); *Ivy H. Smith vs. Kates*, 395 So.2d 263 (Fla. 1st DCA 1981). The E/C argues that the facts of this case are instead more analogous to those in a forty year old case, *City of Miami vs. Granlund*, 153 So.2d 829 (Fla. 1963). Distinct from the "clock out" and "lull time" cases, *Granlund*, involved an automobile inspection worker picked up the pistol of a police officer who appeared to have just unloaded all the cartridges. The worker put the weapon to his own head and pulled the trigger, discharging a bullet which the officer had overlooked. The Supreme Court concluded the employee's conduct was foolhardy and constituted "horse play" of such substantial character as to amount to an abandonment of his employment. In *Dunlevy*, the First District Court of Appeal cites Granlund and notes "in those cases where the horseplay doctrine has been applied to deny benefits, the facts show that the claimants significantly departed from standard employee behavior."

I note from Mr. Chisolms' testimony that teachers are told not to joke around with or to try to he friends with the students. He also testified that Claimant's class was all male and he acknowledged that some level of "male bonding" might be expected, in his testimony regarding his impression when the incident was reported that the teacher and student were so engaged at the time. It is also persuasive that this class, on this day, seems to have included some degree of "lulls" from

the testimony of Mr. Thompson. Considering all of the four factors carefully and weighing the importance of each, I find that the Claimant's actions of trying to get Claimant off of his back in this case were wholly inappropriate and a violation of the school rules. In light of Claimant's prior neck injury and his level of education, the actions were inexplicable and ill advised as well. The departure was momentary however, and do not rise to level of "abandonment of employment" as found in *Granlund*. I conclude that the facts of this case do not rise to the level that the horseplay doctrine would preclude a finding of compensability.

10. In addition to the compensability defenses, the employer/carrier has raised defenses of voluntary limitation of income; refusal of employment suitabe to claimant's capacity, and failure to demonstrate a causal connection between the injury and subsequent temporary wage loss. I find that even if the claim was deemed compensable, claimant has not established a claim for temporary indemnity benefits. Claimant has failed to show that his post-injury physical capabilities preclude adequate performance of his teaching job with the employer, from which claimant resigned shortly after the injury. Facts supportive of this conclusion include the unrebutted testimony of Stan Callendar, president and CEO of Escambia Charter School, that claimant could have retained his job with the employer if he had not quit; physical restrictions allowing claimant to return to work as a teacher; subsequent improvement of claimant's condition following the injury, according to claimant's IME physician (Dr. Lurate) who was the only medical expert to testify, in commenting on claimant's ability to bench lift up to 275 pounds; and claimant's failure to look for numerous teaching opportunities in Escambia County and Okaloosa County. *Vencor Hosp. vs. Ahles,* 727 So.2d 968 (Fla. 1st DCA 1998); *STC/Documentation vs. Burns*, 521 So.2d 197, 198 (Fla. 1st DCA 1988); *City of Claremont vs. Rumph*,

450 So.2d 573, 576 (Fla. 1st DCA 1984); *Interim Services vs. Levy*, 28 FLWD 546; *Mason vs. Home Shopping Network*, 28 FLWD 492. It is persuasive that Claimant has not tried to look for work in the Escambia County School system, or even contacted that school district regarding full time or substitute teaching employment. Of note, Ms. Broxson also quit work at the Employer during the same school year (January 2003) that Claimant did and almost immediately (in January 2003) became employed full time as a math teacher with the Escambia County Schools. Whether Claimant would have enjoyed similar success will never be known only because be never made any contact with that school system to inquire or try. I find that even if the claim for compensability of the neck injury were granted, the claims for temporary indemnity benefits would be appropriately denied on the basis of this voluntary limitation of income and Claimant's failure to demonstrate the wage loss is causally related to the injury(ies) and/or resulting restrictions. *Vencor Hosp.*

Wherefore, it is ORDERED AND ADJUDGED:

1. Claimant's claim for compensability of his neck injury is DENIED. As to this claim, the E/C shall go forth without day.

DONE AND ORDERED in Chambers, Pensacola, Escambia County, Florida on this 13th day of June, 2003.

/s/ [illegible]
Judge of Compensation Claims

[SEAL]

CERTIFICATE

This is to certify that the above FINAL ORDER DENYING COMPENSABILITY OF CLAIM; PAYMENT OF TEMPORARY INDEMNITY BENEFITS, AND AUTHORIZATION OF SURGERY/TREATMENT WITH AN ORTHOPEDIST was entered on the date stated, and that copies were mailed to the parties counsel as set forth below.

/s/ [illegible]
Assistant to the Judge of
Compensation Claims

Roderic G. Magie
25 W. Cedar Street, Suite 660
Pensacola, FL 32501

Michael J. Valen
601 N. Baylen Street
Pensacola, FL 32501

[TRANSCRIPT OF RECORD]

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student at Escambia Charter School in the fall of 2002?

A. Yes, sir.

Q. Were you a student in the construction technology class taught by Michael McWilliams that fall?

A. Yes, sir.

Q. Do you remember a date when the class was outside of the school building constructing benches for the school?

A. I remember it, but I don't know what day it was.

Q. I understand. It's been asserted that that date is October 25, 2002, by Mr. McWilliams, when there was an interaction between you and he. Do you remember that day?

A. Yes, sir.

Q. And was that class outside of the building doing those bench construction projects?

A. Benches and stop signs.

Q. All right. What school period was this class and what time of the day was it, roughly?

A. Sixth period, around two — no, it

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was around one-something.

Q. After lunch, obviously?

A. Yes.

Q. All right. During that class did you approach Mr. McWilliams, point at him and say he's soft?

A. Yes, sir.

Q. And what did Mr. McWilliams do in response?

A. Well, see, we was all playing outside.

Q. I understand that. What did he do when you pointed to him and said - -

A. Twisted my arm.

Q. - - and said you're soft?

A. Twisted my arm.

Q. Mr. McWilliams twisted your arm; is that correct?

A. Yes, sir.

Q. And what did it do to you when he twisted your arm?

A. You know how when you twist somebody's arm and it brings them down?

Q. And how did it bring you down?

A. It just brought me down.

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Q. To where?

A. Towards the ground.

Q. After he brought you to the ground did he let you up?

A. Yes.

Q. What did he say, if anything?

A. He told us to stop playing.

Q. Did he say anything about a Dean?

A. He told us to stop playing before we get in trouble by the Dean.

Q. Now, after he twisted your arm and you went down to the ground, did you approach Mr. McWilliams again?

A. Yes, sir.

Q. What happened?

A. Well, I don't remember all of it, but I jumped on his back.

Q. Now, when you got up to Mr. McWilliams, what did you do?

A. I jumped on his back.

Q. And what did he do?

A. Reached back and tried to grab me, but I had him

like around the neck.

Q. And what did he do?

A. Tried to get me off.

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Q. How did he do that?

A. Trying to pull me off.

Q. And what did he do to you?

A. I jumped off then. He didn't get me all the way off. I got off by myself.

Q. Did you touch Mr. McWilliams when you walked up behind him?

A. Yes.

Q. How did you touch him?

A. That's when I just jumped up on him.

Q. Show the Judge how you jumped on him.

A. This is Mr. McWilliams facing the other class. I jumped up on him and I put my arms around his neck.

Q. When you say you jumped on him, you put your arms around him?

A. Yes.

Q. Is that correct?

A. Yes, sir.

A. You didn't jump up like somebody doing a piggy-back?

A. Yes, that's how I did it. I jumped on his back.

Q. Show me again what you did. Let me

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be Mr. McWilliams.

A. I'm not really going to do it, though.

Q. I understand. Just show the Judge.

A. This is Mr. McWilliams.

Q. Am I facing away from you?

A. Yes.

Q. As Mr. McWilliams. Go ahead.

A. I jumped up and I grabbed him around his neck like this and I was hanging on his back.

Q. Okay, fair enough. And that's all you did?

A. Yes.

Q. And then what did he do to you?

A. He took his arm and he reached back and he tried to get me off, so then I just got off.

Q. I understand. Did he lift you up off the ground?

A. Well, he tried, but I don't think he did.

Q. After Mr. McWilliams let go of you what did he say to you?

A. He said that was enough

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horseplaying, for us to stop before we get wrote up.

Q. When you put your arms around Mr. McWilliams' neck like you did to me just then, did Mr. McWilliams tell you don't do that, let go of me, or anything of that sort?

A. He said let go and stop.

Q. I'm sorry?

A. He said let go and stop.

Q. He said let go and what?

A. He said let go, stop.

Q. And then what did you do?

A. I let go and got off.

Q. Before he tried to get you off, did he tell you to stop touching him?

A. Before I got up there?

Q. No. When you got up there and put your arms around his shoulder, did he say something to you?

A. Yes.

Q. What did he say?

A. Get off and stop.

Q. And what did you do?

A. I let go and got off.

Q. Okay. Well, did he lift you up or

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do anything?

A. Oh, when I first got up there, he reached back and he tried to get me of, but he couldn't get me up. So that's when he said, stop playing and get off.

Q. That was my question, though. Before he tried to get you off, did he say don't touch me, get off?

A. Oh, no.

Q. It was only after he tried to get you off that he then said don't touch me, get off; correct?

A. It sounds like you keep saying the same thing over and over and I keep getting mixed up.

Q. Well, I understand, but we're talking about the difference between when you first put your arms around him and then he tried to get you off. Up to that point he hasn't said —

A. As soon as I got up there, he didn't say nothing.

Q. But after he tried to get you off, then he said get off?

A. Yes.

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Q. Thank you. Now, when Mr. McWilliams grabbed your arm - - grabbed your arm and put you on the ground, did he hurt it?

A. I was just playing. It stung, but I didn't complain about it

Q. I understand you didn't complain, but did it hurt?

A. No.

Q. Did it leave a rash on your arm?

A. For about a second. You know how when you touch somebody it leaves a little rash or something.

Q. Have you personally observed Mr. McWilliams horseplaying with other students before this incident with you?

A. Many times.

Q. When students start horseplaying with Mr. Mcwiiliams, does he physically horseplay back?

A. Not physically.

Q. What does he do?

A. Say that again.

Q. When you have seen the students horseplay with Mr. McWilliams, what did he do in return?

* * * * *

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A. Tate High School.

Q. When did you leave Tate High School?

A. I got expelled for a weapon on campus and assault and battery.

Q. And how many times do you think you have been suspended from school in total since going to school?

A. Many.

Q. Like how many; more than a dozen?

A. More than that.

Q. Maybe a hundred?

A. Close. I've been suspended from middle school, high school. I was suspended out of fifth grade twice.

Q. Have you had to repeat grades?

A. No.

Q. You haven't had to attend any of the grades over again?

A. No, sir.

Q. And you were suspended from school following the incident with Mr. McWilliams?

A. Yes, sir.

Q. How long?

A. Five days.

Q. Were you - - did you ever have any

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conversation with the Principal, Mr. —

A. Oh, I was only suspended for two days for what happened behind his portable, but I also had surgery, so I was out for two weeks. I had my appendix removed.

Q. Did you ever have any in meetings with Mr. Chisolm about this whole incident?

A. I can't remember.

Q. You don't think Mr. Chisolm ever asked you what happened?

MR. NAGIE: Objection; he didn't say that.

THE WITNESS: I'm pretty sure he did. I can't remember. That was a long time ago.

BY MR. VALEN:

Q. And you don't recall any conversations with Mr. Chisolm?

A. Not until I got expelled from Charter. That was the last time I talked to him.

Q. And what was - - you may have said this. What was the reason you were expelled?

A. An incident on the bus.

Q. What happened?

APPENDIX C

SUPREME COURT OF FLORIDA
THURSDAY, MARCH 10, 2005
CASE NO.; SCO5-405
Lower Tribunal No.: 1D03-2849

MICHAEL MCWILLIAMS
Petitioner(s)

vs.

AMSTAFF, ET AL.
Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petifion for Review is hereby dismissed. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

Test:

/s/ Thomas D. Hall
Thomas D. Hall

av

Served:

HON. JON S. WHEELER, CLERK
MICHAEL MCWILLIAMS
RODERIC GREGG MAGIE
HON. DAVID W. LANGHAM

[SEAL]

SUPREME COURT OF FLORIDA
CASE.: 1D03-2849
OJCC CASE No.: 02-048703DWL
ACCIDENT DATE: 10/25/2002

MICHAEL MCWILLIAMS
Petitioner(s)
VS.
AMSTAFF, LIBERTY MUTUAL
Respondent(s)

PETITION FOR WRIT OF CERTIORARI

Pursuant to rule 9.100(a)(b), Michael McWilliams, petitions this court for writ for certiorari to review final judgment denying petitioner worker's comp benefits 440.02(36)

I.

BASIS FOR INVOKING JURISDICTION

Florida constitution provides that the Supreme court has jurisdiction to issue writs of certiorari. See *Fla. Rapp.P 9.100(b)* The original jurisdiction of the court shall be invoked by filing a petition, accompanied by a filing fee and rule 9.030(c) and U.S constitution and Florida constitution

"It is the intent of the legislature to protect the rights of Florida's citizens to exercise their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First United States Constitution and s.5. Art.1 of the State constitution. The legislatures..."

II.

STATEMENT OF THE FACTS

The petitioner is the appellant/claimant in a worker's compensation claim, Section 440.02(36), seeking benefits or award for compensability, temporary partial disability benefits and future medical treatment. The District court

of appeal, First District has issued an Opinion February 8, 2005 affirming the June 13, 2003 order entered by OJCC David Langham denying petitioner/Appellant benefits. The June 13, 2003 order entered by OJCC David Langham denying petitioner benefits was not based on the ultimate facts required by law Florida Statutes 440.25(e) order shall set forth the findings of ultimate facts and mandates. The Judge David Langham asked each attorney to right a final order. The Judge David Langham, ratified, and adopted Amstaff and Liberty Mutual attorney's Mr. Magie's final order that was not based on the ultimate fact required by law. Judge David Langham contradicts himself in his opening statement in the June 13, 2003 order, did Judge David Langham consider all the evidence or did he fail to consider all the evidence/testimony? Judge David Langham refused to hear the claimant connect the issues together in his school documents (Escambia charter Schools Principal letters, Attackers letter, discipline froms, zero tolerance rule, etc..), based on several objection (15 times in ten minutes) (hearsay, refreshing memory, etc) from AmStaff/liberty attorney Mr.Magie who falsely claimed "I didn't even know about the documents". Mr. Magie gave the petitioner/claimant several documents himself from the principal and CEO.

Three letters from AmStaff/liberty/Escambia Charter School were given to my First undecided Attorney as evidence to cancel Petitioner/Appellant/claimant's benefits on Nov. 7, 2002, after the fact. Judge David Langham failed or refused to review those letters as well as the other documents (dismissed evidence).

The petitioner Claimant was hit and threatened three times, on three different days (Oct. 24,25,29) by the Student attacker David Thompson. On Oct. 24, 2002 X teacher Mr. Augistine witness the student David Thompson hit the Petitioner at lunch. Mr. Augistine did not witness the Oct.25 attack that injured the Petitioner/Claimant in his 7th period class. Judge David Langham failed to review the testimony and record, he confuses the fact and lump

all three incidences into one day of his June 13, order to deny the Petitioner/Claimant Worker's comp benefits.

Judge David Langham makes a bais claim against the Petitioner/claimant in his June 13, 2003 final order and portrays the petitioner/claimant in a bad light. Judge Langham: "I accept that David Thompson and Mr. Godwin's account of this is the more credible and believable. Claimant's attempt".....

The record /transcript shows David Thompson jumped the Petitioner/Appellant from behind without warning. David Thompson testified he was kicked out of school around 100 times for assault and battery and two weapon charges. Justin Godwin was not a witness to the attack, he was suspended on Oct.25 for refusing to take detention for threatening the Petitioner/Claimant.

By signing Amstall/Liberty Attorney's Mr. Magie incorrect order, Langharn engaged in conduct that constituted gross negligence or acted in bad faith and contributed to the loss, damage, or injury suffered by the Petitioner and by making bias remark in his order against the Petitioner The District court of appeal, First District has accepted attached transcripts from other hearings to the JCC order under review dated June 13, 2003. The combining of order's confuses the issues or transcripts from another hearing with the final merit of the Petitioner/Appellants final merits.

> Case and point: Florida A. Attorney General Mr. Quaschnick present the Attached order as evidence defending Judge Langham in Petitioner's civil complaint in the circuit court. The A.A.G thought the evidence, order denying benefits for a claimant for injuring himself by hitting a door because he was mad at his wife; pertain to Petitioner's injury and case. A.A G asked Petitioner how me and my wife are getting along now.

Amstall/liberty Attorney's Mr. Magie tries to confuse and twist the facts in petitioners case with a pervious case Attorney's Mr. Magie won for employer International pa-

per. The claimant in that case punched a door in anger and injured himself.

Petitions/appellant's was involved in a hostile environment at the Escambia Charter School (guns, threats, Harassment) and was attacked from behind "without warning" in class by a student, evidence proffered. X teacher Anne Broxon testified that she was a witness to the hostile enviroment at the E.C. School and claimed students threatened to kill her. All critical testimony/evidence has been removed from the record that favored the Petitioner's case, it appears The District court of appeal, First District has abused discretion by failing to address specifically the allocation of pleadings and persuasion of burden of the Ultimate facts in Petitioner's/Appellant's, Appellant's Reply Brief prepared by Appellant's Attorney January 7th 2004 and Appellant's initial brief Nov. 25, 2003 for a worker's comp case and simply adopts the worker's comp David Langhams June 13, 2003 order that was not based on the ultimate facts, just twisted facts, an unrelated opinion and disputed evidence in the record/transcript. The court system has ignored the obvious facts including the doctor's deposition. The Petitioner/Appellant going though 4 weeks of physical therapy after he was injured (Petitioner's Doctor's prescription). Respondent's Worker's comp doctor stated the Petitioner/appellant/claimant was injured and need a MRI. The Doctors did not canceled the Petitioner Worker's comp.

The Respondents/Co-employer Esacambia Charter School principal Mr. Chisolm, it appears cancel the Worker's compensation in retaliation after one Doctor's appointment when the petitioner called off sick on Nov. 4, 2002 to go to his 2nd W-comp Doctor's appointment, based on a false statement accusing Petitioner/Appellant of "horseplay". The worker's comp was canceled within the hour before Petitioner/Appellant/Claimant's Appointment that day. If the student did not attack the teacher/petitioner from behind in class, the Petitioner/Appellant would not be injured.

III.

NATURE OF RELIEF SOUGHT

The nature of relief sought by this petition is a writ of certiorari, Section 440.02(36), Pleading in a worker's comp claim, seeking benefits or award for compensability, temporary partial disability benefits and future medical treatment.

IV.

ARGUMENT

Does the Petitioner have the right in pursuant of the First United States Constitution and s.5. Art, 1 of the State constitution. to petition and defend himself with ultimate facts or can the judges use their gatekeeping authority to dismiss all the ultimate facts and claim anything they please. The fact are Mr. Magie objected, (R-W.C trans., page 18, line 11,19, 22-The court:"stop, stop, please sir.", line 23-I object, your honor). Mr.Magie: I didn't even know about the documents (R-W.C. Trans. Page 20, line 1-2) Mr. Magie's clients gave most of the documents to the Appellant and Mr. Magie himself gave Appellant 3 letter at the deposition. The Appellant was forced to just recall the student discipline referrals from memory and Mr. Magie still keep on objected stating hearsay. On Page 23 Mr. Magie: "Let me Object again. Mr.Magie/Appellee and OJCC himself would not let Appellant use the documents to connect the issues. Appellant's attorney decided to move on because Mr. Magie was objecting all the time. The Appellant's own attorney was absent from the mediation and first deposition hearing and could not connect the issues because he refused to let Appellant explain the evidence/documents to him before the hearing. The Appellant's attorney wanted to keep the case simple, the student jumped the petitioner/appellant from behind and injured the Petitioners back, ultimate fact. The Appellant's attorney did not anticipate the employers false claims and the States conspiracy against the Petitioner/appellants to ignore all evidence. The judge David Langham asked Petitioner to put away all his docu-

ments. Respondents attorney Magie, Objected a few more times to the petitioner/appellant's statements. Petitioner/ Appellant's evidence/documents were not used to connect the issues at the Worker's comp hearing as the transcript show. My Civil Complaint is the Appellant's evidence and rebuttal to Mr. Magie's Florida Bar investigation statement, that said the documents were heard, this statement was incorrect and written by Mr. Magie to support/favor the JCC and respondents in the petitioners civil complaint.

The OJCC Judge Langham favored AmStaffs/Liberty Attorny, Mr. Magie's ever wish and created a Kangaroo court or legal sham. The respondents witnesses disputed testimony's was used as facts and not compared to the evidence and other testimony.

The respondents and co-employer Escambia Charter school did not perform their duties as required by the law and violated McWilliams civil rights. All the respondents, Florida court system and co-employer Escambia Charter school, Escambia school District deviated from their duties (scope of employment) to participate in this cover-up, which violated Appellant's civil rights and denied petitioner a fair hearing.

Petitioner/Appellant was also a state employee. The Respondents and OJCC Judge own action/claims against the Appellant (not in scope of employment) can also be used against the Respondents/appellee/ECS and the JCC, themsetf with the facts.

The District court of appeal, First District has erred, they had no competent substantial evidence to deny Petitioner/Appellant (McWilliams) benefits 440.02(36), 440.09, based on that Petitioner's/Appellant'/claimant injuries did not "arise out of" work performed within the course and scope of employment as required by section 440.02(36)

The statement of facts in this writ and pursuant to 440.25(e) "ultimate facts". Petitioner's/Appellant's, Appellant's Reply Brief prepared by Appellant's Attorney January 7th 2004 and Appellant's initial brief Nov. 25,

2003. All the Doctor's reports proved medical certainty by objective findings as required by section 440.09 Florida Statutes. The Petitioner injury occurrence did arise out of work performed within the course and scope of Petitioner employment. (Ultimate fact).

APPENDIX A.

Vigliotti V. Kmart Corpation, 680 So. 2d 466 (fla.1st DCA 1996) sets forth a two part test for determining compensability in post—1994 workers compensation cases: The claimant must have been performing work in the course and scope of his employment, and two performed by the claimant must he a major contributing cause of the claimants injury. Id. At 467. In Vigliotti, the appellant claimant was a door greeter who was injured when she slipped and fell after clocking out but before she had left the premises of the store. In response to appellee's argument that the new definition of arising out of under Section 440.02(32), Fla.Stat. (Supp.1994) required appellant to prove a casual link between an employee's actual work funiction and the injury, ie., "the work performed" must be the major contributing cause" of the injury, this court explained:" The JCC and District court of appeals, First District erred in concluding that the Petitioner/physical reaction to the assault was the major contributing cause of claimant's injury. All though the JCC in the instant case expressly determined that the danger to teachers from unprovoked attacks by student was foreseeable, (1:183). The employee was on the premises fulfilling his essential job function of teaching delinquent student when he was assaulted from behind without warning, and further because such unwelcome phsyical contact was foreseeable and in the increased zone of risk for teacher employed at the Escambia Charter School. The JCC and District court of appeals, First District erred in denying compensability and determining Claimant's injury did not arise out of or occur within the course and scope of his employment. X teacher Mr. Augistine witness the same student David Thompson hit the Petitioner/Appellant on lunch duty the day before the

Petitioner/Appellant was injured by the student. Anne Broxon testified and stated that students threatened to kill her. 75 teachers have left or quit the Escambia Charter school in 7 years and 15 teachers left the year Petitioner/appellant was injured in the 2002-2003 school year (150% teacher turn-over rate).

See also Orange County MIS Dept V Hak, 710 So.2d 998 (Fla.1st DCA 1998) holding there may be numerous contributing causes leading to an injury but must establish that the employment occurrence is the most preponderant cause of injury. The Petitioner was assault from behind without warning and injured in his 7th period class or on the school premises, "Ultimate Fact".

B

Due process, Florida State Amend. 14, ss1, note 1022. Inferences. "A statute, creating an inference that is given effect of evidence to be weighed against the opposing testimony, violate this clause if created by a state statute and due process clause of Amend. 5.....Internal revenue V. Bian Peanut Co.....; The JCC Judge acted in bad faith and use his gatekeeping authority to blocked or dismissed the Petitioner/Appellant/Claimant's critical evidence to defend himself and JCC portrayed the Petitioner/Appellant/Claimant's in a bad light by making a bias statement against the Petitioner claiming: Judge Langham: "I accept that David Thompson and Mr. Godwin's account of this is the more credible and believable. Claimant's attempt.....There was no evidence in the record to support the JCC statement.

The record/transcript shows David Thompson jumped the Petitioner/Appellant from behind without warning. David Thompson testified he was kicked out of school around 100 times for assault and battery and two weapon charges. Justin Godwin was not a witness to the attack, he was suspended on Oct.25 for reflising to take detention for threatening the Petitioner/Claimant. The dismissed evidence shows David Thompson was talking about Justin Richard in his Nov. 4, 2002 letter that was also dismissed/ denied by the Worker's comp Judge David Langham.

District court of appeals, First District erred it acted in bad faith or with malicious purposes or in a manner exhibiting wanton and willful disregard of hurnan rights, safety or property.

C

If it is insufficient to plead opinions, theories, legal conclusions or arguments, (Barrett v. City of Margate, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) than why do the Respondent continue to do so, a major parts of Langham's/ Mr.Magie final order was based on the employer's attorney Mr. Magie's opinions, theories and implied conclusions which ignored the "Ultimate Facts"

Florida Statutes 440.25 (e) order shall set forth the findings of ultimate facts and mandates. The Judge David Langham knowingly participated, ratified, condoned or consented to such conduct by signing Mr. Magic's final order. By signing the order the judge David Langham engaged in conduct that constituted gross negligence and that contributed to the loss, damage, or injury suffered by the Petitioner/Appellant. Judge David Langham on July 2, 2003 attacked a unrelated opinion from the AmStaff/Liberty Mutuals Attorney to Judge David Langham June 13, 2003 order that is unrelated to the facts in the Petitioner/appellant worker's comp case that the District court of Appeals, First District has adopted in error.

D

The Petitions/appellant's shows the District court of Appeal, First District erred or abused discretion by failing to address specifically the allocation of pleadings and persuasion of burden, but simply adopted the Worker's comp judges June 13, 2003 order not based on the "ultimate Facts" or simply relied on: "wisdom and expertise of a trial judge to exercise their gatekeeping authority when assessing whether all, some, or none of the evidence related to the employer alternative avenue warrant introduction at trial" 325f.3d.463.

There is no cause for leaving Federal District court thus unguided.

Pennsylvania state police v. Suder 325 f.3d 432(2004), vacated and remand.

The appellant present genuine issues of material fact concerning Petitioner's/appellant's hostile work environment, constructive discharge, Worker's comp claim and misconduct claims (court system) that injured or damaged the Petitioner

In summary, the Petitioner contends that the District court of appeals, First District findings are incorrect and their orders are devoid of merit and ultimate facts. There was no substantial evidence to support the District court of appeals, First District's order. The Attorney(s) A.G. Charles Crist Jr. (Petitioner suing in Fed. Court)/ Florida court system has conspired against the Petitioner by ignoring the "Ultimate Facts"or the Florida court system just chose to support the power struggle in the community/ State and interfered in the case and deprived the petitioner of his civil rights and due process in pursuant of the First United States Constitution and s.5. Art. 1 of the State constitution The Florida District Court of Appeal, First District I believe has erred, they acted in bad faith as well as the Workers comp Judge David Larngham's

Therefore the petitioner's worker's comp 440.02(36) benefits should be award for compensability, temporary partial disability benefits and future medical treatment, in the instant case.

S -- 8548

Michael McWilliams
6662 Hetzel Drive
Milton, FL 32570
(850) 983-0492

Certificate of Service

I hereby certify that a copy of the Foregoing motion has been furnished by mail to the below listed persons on the 26 day of February 2005.

Supreme Court of Florida,
Thomas D. Hall,Office of
500 South Duval St
Tallahasse, Fl 32399-1927

Michael McWilliams
6662 Hetzel Drive
Milton,Fl 32570
(850)983-0492

Jon S. Wheeler,Clerk
District Court of Appeal,
First District
301 Martin Luther king Jr
Boulevar Tallahasse,Fl 32399-1850

Roderic Magie
25 West cedar St
Suite 660
Pensacola Fl 32501

APPENDIX D

SUPREME COURT OF FLORIDA
TUESDAY, APRIL 26, 2005
CASE NO.: SCO5-405
Lower Tribunal No.: 1D03-2849

MICHAEL MCWILLIAMS
Petitioner(s)
vs.
AMSTAFF, ET AL.
Respondent(s)

Petitioner's "Motion to Reinstate the Appeal and Objects to the Supreme Courts March 10, 2005 Order, Review is Hereby Dismissed" filed March 23, 2005 and "Objects to the Supreme Courts March 10, 2005 Order, Review is Hereby Dismissed. No Motion for Rehearing will be Entertained by the Court. Therefore, Petitioner Appeal's this Case Directly to the United State Supreme Court. Petition for Writ of Ceniorari" filed March 31, 2005, have collectively been treated as a motion for rehearing; and pursuant to this Court's order dated March 10, 2005, the Motion for Rehearing is hereby stricken as unauthorized.

ATrue Copy

Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

[SEAL]

bhp

Served:
HON. JON S. WHEELER, CLERK
HON. DAVID W. LANGHAM, JUDGE
MICHAEL MCWILLIAMS
RODERIC GREGG MAGIE

SUPREME COURT OF FLORIDA
CASE No.: SCO5-405
DCA No.: 1DO3-2849
OJCC CASE No: 02-048703DWL
ACCIDENT DATE: 10/25/2002

MICHAEL MCWILLIAMS
Petitioner(s)

VS.

AMSTAFF,LIBERTY MUTUAL
Respondent(s)

PETIONER/APPFLLANT OBJECTS TO THE SUPREME COURTS MARCH 10, 2005 ORDER, REVIEW IS HEREBY DISSMISSED. NO MOTION FOR REHEARING WILL BE ENTERTIANED BY THE COURT. THEREFORE, PETITONER APPEAL'S THIS CASE DIRECTLY TO THE UNITED STATE SUPREME COURT .PETITION FOR WRIT OF CERTIORARI

1. The petitioner/Apellant has read Jenkins V State and has concluded that this court may have erred. In Jenkins V .State, "the Supreme court, Sunberg, J., held that court lacks jurisdiction to review District court appeal's decision, which read in its entirely "Per Curaim Affirmed", though the decision was accompanied by dissenting opinion. This case is not in conflict with the agency opinion. The Florida Constitution and Florida Statutes clearly show this court has the jurisdiction to review this case. Florida Statutes 2004 Title X 120.68 judicial review. It appears, Jenkins V .State is only being used as a inference (note 1022Due process) that is given effect of evidence to be weighed or to block an appeal to the Florida Supreme Court..

2. The issue in this case is not the Worker's comp judge's discretion, it is the Worker's comp Judge's discrimination (bad faith, unconstitutional) against the Petitioner/Appellant. The Petitioner/Appellant is only asking the court

to reweigh the ultimate facts that are not disputed and that are confined to the transcript as described by law in pursuant to 120.68 (4) in accordance with paragraph (7)

3. These Ultimate facts are not disputed in this case. The student attacker admitted to jumping the petitioner/ Appellant from behind without warning in class. The expert witness Doctor Lurate testimony concluded that the attack injured the petitioner/Appellant (Ultimate fact). These facts support the petitioner appellant/claimant in a worker's compensation claim, Section 440.02(36), seeking benefits or award for compensability, temporary partial disability benefits and future medical treatment.

4. The June 13, 2003 order entered by OJCC David Langham denying petitioner benefits was not based on the ultimate facts required by law Florida Statutes 440.25 (e) order shall set forth the findings of ultimate facts and mandates (as discussed in the petitioner/Appellants PETITION FOR WRIT OF CERTIORARI)

5. The agency's action is not supported by competent substantial evidence in the record. The DCA and Lower tribunal has disagreed or ignored the Ultimate facts in this case, therefore the agency's actions are unconstitutional in pursuant of 120.68(1),(2)(a)(4),(6)(7),(a),(b), (c),(d),(e)1,2,3,4 ,(9),(10)

6. 120.68 (1) "A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order....or...administrative law judge....is immediately reviewable if review of the final agency decision would not provide an adequate remedy".

7. The petitioner appellant/claimant appeal should be considered in pursuant of 120.68 (2)(a) Judicial review shall be sought.....If the Appeal is of an order rendered in a proceeding initiated under S. 120.56, agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee. 120.68 (7)(b) "the agency action depend on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing

conducted pursuant to ss. 120.569 and 120.57 ....." The petitioner appellant/claimant's attorney claimed the lower tribunal erred and had no competent substantial evidence to deny the petitioner appellant/claimant worker's comp benefits in pursuant of 440.02(36), 440.09 Florida statutes.

8. The District Court of appeal's affirmed lower tribunal order that violated the rules in pursuant to 440.02(36), 440.09, 440.25(e) 120.68(7)(c) The Fairness of a proceeding... "failure to follow prescribed procedure" (d)The agency has erronously interpreted a provision of law.... (e) the agency's exercise of discretion was:

1. outside the range of discretion delegated to the agency by law;

2. inconsistent with agency rule;

3. inconsistent with the official stated agency policy or prior practice, if deviation therefrom is not explained by the agency;

4. Otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for the agency on an issue of discretion.

9. Petitioner's writ; The District court of appeal, First District has erred, they had no competent substantial evidence to deny Petitioner/Appellant (McWilliams) benefits 440.02(36), 440.09, based on that Petitioner's Appellant's/ claimant injuries did not "arise out of" work performed within the course and scope of employment as required by section 440.02(36).

The statement of facts in this writ and pursuant to 440.25(e) "ultimate facts". Petitioner's/Appellant's, Appellant's Reply Brief prepared by Appellant's Attorney January 7th 2004 and Appellant's intial brief Nov. 25, 2003 'All the Doctor's reports proved medical certainty by objective findings as required by section 440.09 Florida Statutes. The Petitioner injury occurrence did arise out of work performed within the course and scope of Petitioner employment. (Ultimate fact).

10. The Florida Supreme court has the right to review this case under the current law title X 120.68, (9) No peti-

tion challenging an agency final order.....except to review an order entered pursuant to a proceeding under 120.56 or...or...or necessity, and procedural fairness prerequisite to the adoption of an emergency rule of procedure to s. 120.54, unless the sole issue presented by the petition is the constitutionality of the rule and there are no disputed fact. (10) If the administrative law judge's final order depends on the facts found by the admjnistrative law judge's.....The court shall set aside the final order....., if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding.

11. The petitioner received this court's March 10, 2005 order on March 15, 2005

Certificate of Service

I hereby certify that a copy of the Foregoing motion has been furnished by mail to the below listed persons on the 30 day of March 2005.

Supreme Court of Florida,
Thomas D. Hall,Office of
500 South Duval St
Tallahasse, Fl 32399-1927

Michael Mcwilliams
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Jon S. Wheeler,Clerk
District Court of Appeal,
First District
301 Martin Luther king Jr
Boulevard Tallahasse,FL 32399-1850

Roderic Magie
25 West cedar St
Suite 660
Pensacola Fl 32501

No. 05-133

Supreme Court, U.S.
FILED
OCT 28 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

IN RE
" MICHAEL MC WILLIAMS"

Petitioner

v.

AMSTAFF,ET AL.

Respondents

On Petition For rehearing of A Writ Of Certiorari To the Supreme Court of United Sates

A REHEARING OF PETITION FOR A WRIT OF CERTIORARI

MICHAEL MC WILLIAMS
6662 HETZEL DRIVE
MILTON ,FLORIDA 32570
(850)-983-0492

Questions Presented

1. **Does the Petitioner have the right or equal protection under the law of the U.S 14th Amendment and of the First Amendment of the United States Constitution and s.5. Art.1 of the State constitution to petition or challenge a judge's order ,that's in bad faith or that was not based on the undisputed Ultimate facts and expert witness (Doctors) in the record .**

2. **Does the Petitioner McWilliams (Teacher) have the right to challenge the Florida court systems findings that failed to remedy or explain the Workers compensation judge's contradictory statements in his opinion and final conclusion, that are not based on the merits or facts in the transcript, and that denied or forfeited compensation because the injured teacher McWilliams deviated from his scope of employment (in self defense) and injured himself removing the student attacker from his back in class.**

3. **Where is the evidence in the record or medical evidence in the record to support the dishonorable Judge of compensation claims or his June 13, 2003 order or the respondents claims or their witnesses.**

CORPORATE DISCLOSURE STATEMENT

All parties do not appear in the caption . The Parent of AmStaff Human resource Inc., (co-employer) and Liberty Mutual Insurance company is Escambia Charter School (Client company) that is sponsored by and apart of the Escambia County School District and funded by the State of Florida.

THE PETITIONER MOTIONS THIS COURT FOR A REHEARING OF **A WRIT OF CERTIORARI THAT HAS NOT BEEN READRESSED BY THE FLORIDA COURT SYSTEM OR FEDERAL COURT SYSTEM AND IS IN VIOLATION OF THE PETITIONER'S FIRST AND 14TH AMENDMENT RIGHTS**

I OPINION AND ORDERS BEING CHALLENGED

It appears, the court systems has failed to consider all the evidence .The Worker's comp judges acted in bad faith, his June 13,2003 order is bias and incorrect. In general the agencies has failed to address or remedy the OJCC claims, that erroneously interpreted a provision of law or that are inconsistent with agency rule or that is in conflict with the OJCC opinion, merits of the hearing and attached opinion . Therefore, passing upon a question certified to be of great public importance and to the fairness of a proceeding which fails to follow prescribed procedure based on the undisputed ultimate facts.

II. JURISDICTIONAL STATEMENT

This court has jurisdiction for rehearing writ of certiorari or extraordinary writ filed within 25 days of Oct.3,2005 prescribed by rule 44 (2). Petition for rehearing is on time by October 28,2005.

III STATEMENT OF THE CASE

The petitioner is the appellant/claimant in a worker's compensation claim, Section 440.02(36), seeking benefits or award for compensability, temporary partial disability benefits and future medical treatment for a neck injury cause by an ECS student jumping/attacking the petitioner (teacher) from behind with out warning in class. . The JCC David Langham June 13,2003 order denied petitioner/Appellant benefits, stating petitioner injured himself removing the student from his back. The June 13,2003 order entered by JCC David Langham was in bad faith, it was not based on the ultimate facts in the record or

equired by law, Florida Statutes 440.25 (e) "order shall set forth the findings of ultimate facts and mandates". The Judge David Langham asked each attorney to right a final order. Judge David Langham Favored, ratified, and adopted Amstaff and Liberty Mutual attorney's Mr. Magie's final order that was not based on the ultimate facts in the record required by law. The JCC judge Langham furthermore stapled an opinion from respondents own attorney, from Mr.Magie's own previous case (No.: 265-04-0429) that is in conflict with the JCC Langham's June 13,2003 order denying petitioner benefits. The attached order was not base on "horseplay" or about being attacker by another person.The Worker comp Judge's statements in his opinion are bias, meaning he only accepts the Respondents story. The Judge combines three different incidents, on three different days involving the same Student attacker into one incident. The Judge uses this strategy to combine three separate incidences to imply Mr. Augistine and Justin godwin were a eye witness to the attack in his June 13, 2003 order, but they were not. Mr.Augistine witnessed the attacker approach and hit the Petitioner at lunch, Appendix 1a (Oct.24,2002.) The Student, David Thompson jump-attacker the Petitioner from behind without warning in class on Oct. 25,2002. The Charter school principal refused to file an accident report or hear any complaints about the incident on Oct.26 and on Monday Oct.28,2002. The CEO and principal left town after lunch on Oct.28,2002,Appendix 2a. The Student David Thompson was not suspended, he hit and threatened the Petitioner again in class on Oct. 29,2002 Appendix 3a. Mr. Augistine was hit by a Student at lunch and immediately quit that same day on Oct. 29,2002. I, Petitioner had to take over Mr. Augistine class with Student David Thompson in it on Oct. 29,2002. I called and explained the 4 incidents to Co-employer AmStaff on Oct.29,2002,they sent me to their worker's comp Doctor on Oct.29,2002. All the respondents presented false or incorrect documents, after Petitioner was forced to physically quit on Nov.1,2002. Amstaff –Liberty Mutual canceled petitioner's

comp in retaliation (2 p.m.11/4/02) after Petitioner called off work at 7a.m 11/4/02 due to his injury , unsafe conditions at the school and due to his 2nd doctors appointment. Amstaff – Liberty Mutual accepted the false or incorrect documents as fact. The Student David Thompson own Nov.4,2002 letter describes the 3rd incident with petitioner on Oct.29,2002 and shows he was not suspended for attacking Petitioner on Oct.25,2002. The Respondents Documents don't make sense, and the judge and court system has refuse to review those documents plus other documents that clearly show a time frame of people and events.

IV REASON FOR GRANTING THE REHEARING

A The agency's exercise of discretion was outside the range of discretion delegated to the agency by law and unconstitutional in pursuant of 440 law. The judge used his gatekeeping authority to omit Petitioner's critical evidence to defend himself, like; School Documents at the time of the three incidents, Amstaff three letters that canceled Petitioner's comp, etc.. The Judge omits final merits from the May,14,2003 hearing. The Judge of compensation claims, he denied compensation because the injured teacher McWilliams deviated from his scope of employment (in self defense) and injured himself removing the student attacker from his back in class. The OJCC judge's claims contradict his opening statement and the witnesses testimony in the transcripts. The Judge claims that the student attacker and other student (false witness) Statements where more believable. Therefore, why does the Judge June 13,2003 order ignore the Student attackers testimony in the transcript. The Attacker admitted to being kicked out of school for assault and battery about 100 time and on two weapon charges. The student Attacker David Thompson also testified, that he was glad he injured the Petitioner-teacher McWilliams.

David testified, that petitioner did not physically horse around in class. All claims by the Worker's comp Judge in his June 13 order are incorrect or false, his claims are made out of context and are devoid of the undisputed facts in the record . The Petitioner has been denied a fair hearing by all court system which is unconstitutional. The Judge has fabricated a story that is false, all the evidence is proffered, some is included appendix a. Each court has failed to explain where the OJCC claims are taken from in the record. The OJCC quotes the respondents witness claims as fact in his June 13,2003 order disregarding the ultimate fact to support the respondents (State Agent).

B. The Worker comp judge fails to connect the undisputed ultimate facts or issues together in his opinion to support his conclusion based on the respondents claims, that the petitioner's was involved in horseplay and was the one who initiated the incident. The student attacker testified he jumped the petitioner from behind in class without warning.He also testified that Petitioner did not defend himself. I (attacker) just got off the petitioner's back and let him go. Justin Godwin was not a witness to the attack on 10/25/02, but he testified that the Petitioner did not defend himself. Justin claimed he only seen the petitioner (teacher) grab the attackers arm first, but did not see the petitioner use a wrestling move to defend himself. The OJCC judge's conclusion Petitioner injured himself contradict his opening statement that claim that the student attacker and other student (false witness) Statements where more believable.
The insurance company cancel the Petitioner's worker's comp benefits on November 4,2002, not their worker's comp Doctor. The insurance company cancel the

Petitioner's worker's comp benefits based on the Escambia Charter School's principles phone call and student attacker's Nov.4,2002 letter that claims the petition was involved in "horseplay". The Petitioner-teacher wrote up the student attacker a couple of times for "horseplay" in class before this incident . The student David refused to take in school punishment suggested by the principal which it appear initiated the attack and two other incidences on the petitioner. The student was on probation.

C. The Courts ignore the pre-columbined conditions at the school and employees statements,appendix a- a

CONCLUSION

In summary, the Petitioner Writ of certiorari refers to the record and merits in the Appendix . The court system has fail to connect the issues together in Petitioner writ of certiorari and contends that the Supreme Court of United States(denied,1a), The Supreme Court of Florida (Unauthorized or stricken)and District court of appeals, First District (Affirming) are incomplete or have erred in failing to make findings in the Petitioner's writ to support a case or fails to redress a Grievance. (The world book encyclopedia),In Cantwell v. Connecticut,310 U.S. Supreme Court ruled that the First Amendment's guarantees preclude not just "congress" local authorities from passing laws that would infringe on first amendment rights. The JCC June 13 ,2003 order is in bad faith, it is incorrect and devoid of merit and ultimate facts. There was no substantial evidence to support the District court of appeals, First District's order Affirming the JCC June 13 ,2003 order that each court has adopted as fact in bad faith. Where in the record is the evidence to support the JCC June 13,2003 order. The courts have failed to compare the record to the June13,2003 order. Petitioner demands relief Section 440.02(36), seeking benefits or award for compensability, temporary partial disability benefits and future medical treatment for a neck injury cause by an ECS student jumping/attacking the petitioner (teacher) from behind with out warning in class.

Proof of Service

I, The Petitioner's , "*In re* Michael McWilliams", do swear or declare to the best of my knowledge that on this date Oct 27,2005, as required by Supreme Court rule 44 and rule 20, I have Petition For A rehearing of Writ of Certiorari on each party to the above proceeding or that parties counsel that the foregoing is being timely served by mail (prepaid) to the below listed persons on the 28 day of October 2005 .

Supreme Court of United States
Office of The Clerk
Washington, DC 20543 0001

Roderic Magie
25 West Ceder St
Suite 660
Pensacola,Fl 32501

Other ?

I declare under the penalty of perjury that the foregoing is true to the best of my knowledge and correct on the 28 day of October 2005 .

MICHAEL MC WILLIAMS
6662 HETZEL DRIVE
MILTON ,FLORIDA 32570
(850)-983-0492

Supreme Court of the United State

October 3,2005

Re: Michael Mc Williams
v. Amstaff,et al.
No.05-133

Dear Mr. McWilliams:

The Court today entered the following order in the above – entitled case:
The Petition for a writ of certiorari is denied.

Sincerely,
William K Sutan,Clerk

Pensacola, Florida
2304 West Avery
Street 32505

Dear Sir or Madam:
I am Freddie Augustine, I am writing this letter in support of Mr. McWilliams. Mr. McWilliams and I were standing on the school property talking one day during the lunch period when David Thompson came where we were standing and grab Mr. McWilliams by his arm.

Mr. McWilliams did not give him any leads, nor did he invite him into his private space to do what he did.

This letter is true to the best of my knowledge of what I witnessed on that day.

Yours truly,

Freddie Augustine

(White Male Student David Thompsons 11/4/2002 letter)

11/7/2002 10:50 8504784088 AMSTAFF PAGE 02

On October 29 I walked to class with Mr. Mc Williams. When we got to class he noticed 2 holes in the wall, he said that Justin and I did it, because we were play in when we got there. Well I was playing around with Mc Williams then a while back I was play in with him by a portable and I guess he couldn't handle his own weight, he grabbed my arm and we began to horseplay, I got up after he got me to the ground, I'd jumped up on his neck.

David Thompson
11-4-02

Nov. 04 02 03: 14p ECS 850 868 5605

(highlight from article)

PENSACOLA
NEWS JOURNAL

SCHOOL ACCUSED OF IMPROPRIETY

Escambia Charter fixed student grades,teachers say

Jenny La Coste

An Escambia Charter School that aims to give students with discipline problems a second chance is under fire, facing allegations that school officials fix grades,employ uncertified teachers' and placed teachers' and students'safety at risk.

Several current and former employees of Escambia Charter school- the first charter school in Escambia county-called for an investigation.

" The things I have heard alarm me," said Charles Thomas, the Director of alternative education. They are serious, and I take them seriously" The school employs about 10 teachers to serve a student population of about 150 students. About 75 teachers have left the school in the past three years. Teachers point to the high turn over as an indication of problems.

The school board of directors heard the allegations last week and asked AmStaff Human resources, the company that leases employees to the school, to conduct an investigation.

See GUN INCIDENT,4A

5a

(local news article)

GUN INCIDENT WORRIES CHARTER TEACHER

"(The situation) was handled absolutely improperly," she said. Roberts had no idea the boy had a gun. One of the school's administrators called her classroom and asked her to send the boy, with his belongings, to the office. No one was sent . to her classroom to assist, and she wasn't toll about the very real danger that one of her students was armed with a handgun.

The boy was confrontational when she asked him to leave. "Finally, he gets up and walks outside, then he turns, like he's going to reach into his book bag, and I said, Don t do it, " she said. "I didn't put it together until later. I had no idea how much danger I was in, how much danger my students were in."

The boy who initially brought the gun to school was expelled, but Roberts said the student who had it in her classroom and the other ' student who handled it were given light suspensions.

Uncertified teachers

Former teacher Kim Levick said she found out the school employed uncertified teachers during parent-teacher night. Her name was listed on report cards of students she had never taught. "These people are coming up to me and I have to say, 'I'm sorry, I didn't teach your child that class, " she said.Levick and other teachers say their names were used when uncertified teachers taught a class.

By state law, teachers in charter schools must be certified.Artie Davis, who served as the school's assistant principal three years • ago, said he saw similar things happen when he was at the school. Davis said few employees complained for fear of being fired.

"Anyone that disagrees with him (school directorStan Callender) disappears," he said; "It doesn't matter if it's in the middle of the week. It doesn t matter if it's in the middle of Davis the school day. I've sent kids to class only to find there's no teacher there."

Jennifer Ray field, the school's most recent valedictorian, said she was disappointed with the school's academic opportunities. Rayfield, 19, left Washington High because she had a child and needed a more flexible learning environment. She hoped the school . would prepare her for college and a job."When I first got there, there were no books in the classroom, nothing," she said. "The teachers weren't teaching. I did absolutely nothing that first year and I got straight A s, but I wasn't learning anything."

PROBE FINDS PROBLEMS AT THE SCHOOL

Escambia Charter School taking steps to address complaints

Jenny LaCoste
@PensacoiaNewsJournal.com

An investigation into Es-cambia Charter School has revealed numerous red flags in the way the school does business, but the school's board of directors feels most of the problems highlighted in the investigation have been resolved.

AmStaff Human Re-sources, the company that leases employees to the school, investigated allegations made by current and former teachers and reported back to the school's board of directors Tuesday.

The board took no action but directed the school's administrator, Stan Callender — the focus of much of the investigation — to develop policies to help make sure the problems are not recur-ring.

The investigation's findings include:

- Uncertified teachers taught classes last school year, a violation of Florida law.
- Principal Jerome Chisholm admitted to taking alcohol to the school on two occasions and drinking it with teachers. He said students already were gone for the day. Possession and/or use of alcoholic beverages in the workplace violates AmStaff's Drug-Free Workplace policy.
- Callender took school school power washer for personal use. Callender said he took the equipment home so it wouldn't be stolen and that since that time the board has approved a policy that does not allow staff to take equipment home.
- Callender has addressed staff members in a nonpro-fessional manner.

Charter schools are public schools funded with tax dollars but operated by private individuals or groups. A board of directors oversees school polices and operations.

Escambia Charter, the counties oldest charter school has been open for eight years- caters to students who have been suspended Or expelled from the traditional, public school system, or students who do not perform well in traditional settings.

Local school boards approve charter contracts but have no input in a school's day-today operations. School boards review charter school contracts annually and can terminate a contract if the health, welfare or safety of students is in Jeopardy.

like around the neck.

Q. And what did he do?

A. Tried to get me off.

103

Q. How did he do that?

A. Trying to pull me off.

Q. And what did he do to you?

A. I jumped off then. He didn't get me all the way off. I got off by myself.

Q. Did you touch Mr. McWilliams when you walked up behind him?

A. Yes.

Q. How did you touch him?

A. That's when I just jumped up on him.

Q. Show the Judge how you jumped on him.

A. This is Mr. McWilliams facing the other class. I jumped up on him and I put my arms around his neck.

Q. When you say you jumped on him, you put your arms around him?

A. Yes.

Q. Is that correct?

A. Yes, sir.

A. You didn't jump up like somebody doing a piggy-back?

A. Yes, that's how I did it. I jumped on his back.

Q. Show me again what you did. Let me

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be Mr. McWilliams.

A. I'm not really going to do it, though.

Q. I understand. Just show the Judge.

A. This is Mr. McWilliams.

Q. Am I facing away from you?

A. Yes.

Q. As Mr. McWilliams. Go ahead.

A. I jumped up and I grabbed him around his neck like this and I was hanging on his back.

Q. Okay, fair enough. And that's all you did?

A. Yes.

Q. And then what did he do to you?

A. He took his arm and he reached back and he tried to get me off, so then I just got off.

Q. I understand. Did he lift you up off the ground?

A. Well, he tried, but I don't think he did.

Q. After Mr. McWilliams let go of you what did he say to you?

A. He said that was enough

horseplaying, for us to stop before we get wrote up.

Q. When you put your arms around Mr. McWilliams' neck like you did to me just then, did Mr. McWilliams tell you don't do that, let go of me, or anything of that sort?

A. He said let go and stop.

Q. I'm sorry?

A. He said let go and stop.

Q. He said let go and what?

A. He said let go, stop.

Q. And then what did you do?

A. I let go and got off.

Q. Before he tried to get you off, did he tell you to stop touching him?

A. Before I got up there?

Q. No. When you got up there and put your arms around his shoulder, did he say something to you?

A. Yes.

Q. What did he say?

A. Get off and stop.

Q. And what did you do?

A. I let go and got off.

Q. Okay. Well, did he lift you up or

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do anything?

A. Oh, when I first got up there, he reached back and he tried to get me of, but he couldn't get me up. So that's when he said, stop playing and get off.

Q. That was my question, though. Before he tried to get you off, did he say don't touch me, get off?

A. Oh, no.

Q. It was only after he tried to get you off that he then said don't touch me, get off; correct?

A. It sounds like you keep saying the same thing over and over and I keep getting mixed up.

Q. Well, I understand, but we're talking about the difference between when you first put your arms around him and then he tried to get you off. Up to that point he hasn't said —

A. As soon as I got up there, he didn't say nothing.

Q. But after he tried to get you off, then he said get off?

A. Yes.

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Q. Thank you. Now, when Mr. McWilliams grabbed your arm - - grabbed your arm and put you on the ground, did he hurt it?

A. I was just playing. It stung, but I didn't complain about it

Q. I understand you didn't complain, but did it hurt?

A. No.

Q. Did it leave a rash on your arm?

A. For about a second. You know how when you touch somebody it leaves a little rash or something.

Q. Have you personally observed Mr. McWilliams horseplaying with other students before this incident with you?

A. Many times.

Q. When students start horseplaying with Mr. Mcwiiliams, does he physically horseplay back?

A. Not physically.

Q. What does he do?

A. Say that again.

Q. When you have seen the students horseplay with Mr. McWilliams, what did he do in return?

* * * * *

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A. Tate High School.

Q. When did you leave Tate High School?

A. I got expelled for a weapon on campus and assault and battery.

Q. And how many times do you think you have been suspended from school in total since going to school?

A. Many.

Q. Like how many; more than a dozen?

A. More than that.

Q. Maybe a hundred?

A. Close. I've been suspended from middle school, high school. I was suspended out of fifth grade twice.

Q. Have you had to repeat grades?

A. No.

Q. You haven't had to attend any of the grades over again?

A. No, sir.

Q. And you were suspended from school following the incident with Mr. McWilliams?

A. Yes, sir.

Q. How long?

A. Five days.

Q. Were you - - did you ever have any

conversation with the Principal, Mr. —

A. Oh, I was only suspended for two days for what happened behind his portable, but I also had surgery, so I was out for two weeks. I had my appendix removed.

Q. Did you ever have any in meetings with Mr. Chisolm about this whole incident?

A. I can't remember.

Q. You don't think Mr. Chisolm ever asked you what happened?

MR. NAGIE: Objection; he didn't say that.

THE WITNESS: I'm pretty sure he did. I can't remember. That was a long time ago.

BY MR. VALEN:

Q. And you don't recall any conversations with Mr. Chisolm?

A. Not until I got expelled from Charter. That was the last time I talked to him.

Q. And what was - - you may have said this. What was the reason you were expelled?

A. An incident on the bus.

Q. What happened?

APPENDIX C

SUPREME COURT OF FLORIDA
THURSDAY, MARCH 10, 2005
CASE NO.; SCO5-405
Lower Tribunal No.: 1D03-2849

MICHAEL MCWILLIAMS
Petitioner(s)

vs.

AMSTAFF, ET AL.
Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petifion for Review is hereby dismissed. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

Test:

/s/ Thomas D. Hall
Thomas D. Hall

av

Served:

HON. JON S. WHEELER, CLERK
MICHAEL MCWILLIAMS
RODERIC GREGG MAGIE
HON. DAVID W. LANGHAM

[SEAL]

SUMMARY OF ARGUMENTS

There was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant's injuries did not "arise out of" work performed within the course and scope of employment as required by Florida Statutes 440.02(36). Further, there was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant failed to prove injuries with medical certainty by objective findings as required by 440.09. Lastly, there was no competent substantial evidence for the JCC to deny temporary partial benefits where Claimant demonstrated a connection between his injuries and a loss of income.

ARGUMENT

I. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSABILITY CLAIMS TO DENY COMENSABILITY ON BASIS THAT CLAIMANT'S INJURIES DID NOT "ARISE OUT OF" WORK PERFORMED WITHIN THE COURSE AND SCOPE OF EMLOYMENT AS REQUIRED BY SECTION 440.02(36).

Although the Judge of Compensation Claims expressly determined that Claimant had not "abandoned his job duties" or deviated from his employment to the extent he was engaged in horse play, the JCC nonetheless erred in deteimining Claimant was not acting within the course and scope of employment when he was physically assaulted by a student while engaged in his normal duties of teaching class to troubled youth. "I find that competent substantial evidence does not support that the Claimant was in course and scope of employment when injury occurred." (I:180). Further, although the JCG expressly determined that physical contact initiated by students upon teachers was reasonably foreseeable, (I:183) the JCC erred by concluding instead that Claimant's "impermissible physical reaction" to being jumped from behind by a delinquent student was the major contributing cause of his injuries.

Vigliotti v. Kmart Corporation, 680 So.2d 466 (Fla. 1st DCA 1996) sets forth a two part test for deteemining com-

pensability in post-1994 workers compensation cases: 1) The claimant must have been peerforming work in the course and scope of his employment, and 2). the work performed by the claimant must be the major contributing cause of the claimant's injury. *Id.* at 467. In *Vigliotti*, the appellant claimant was a door greeter for Kmart who was injured when she slipped and fell after clocking out but before she had left the premises of the store. In response to appellee's argument that the new definition of arising out of under Section 440.02(32), Fla. Stat. (Supp. 1994) required appellant to prove a causal link between an employee's actual work function and the injury, i.e., "the work performed" must be the "major contributing cause" of the injury, this court explained: "We see nothing, however, in the extensive revisions to the workers compensation law to indicate the legislature intended to broaden tort liability of employers in this fashion as a solution to the workers compensation crisis." *Id.* at 467. The court noted that such an interpretaflon of the phrase "arising out of" as advocated by the appellees, would necessarily limit compensability to those injuries occurring during the performance of only primary job duties thereby broadening the potential tort liability for every employer in Florida. *Id.* at 467. Moreover, this court noted such construction would contravene the legislative intent to ensure the prompt delivery of benefits to the injured worker by an efficient and self-executing system.

In the instant case the JCC erred in concluding it was Claimant's physical reaction to the assault which was the major contributing cause of Claimant's injuries. Although the JCC in the instant case expressly determined that the danger to teachers from unprovoked attacks by students was foreseeable, (I:183) by concluding that Claimant's "physical reaction" to a student assault was the major contributing cause of his injuries, the JCC has inadvertently exposed the employer in the instant case to tort liability in contravention to the admonitions of *Vigliotti*. Because the Claimant in the instant case was on the employer premises fulfilling his essential job function of teaching delinquent students when

he was assaulted from behind without warning, and further because such unwelcome physical contact was foreseeable and within the increased zone of risk for teachers employed at Escambia Charter School, the JCC erred in denying compensability and determining Claimant' injuries did not arise out of or occur within the course and scope of his employment. *See, also, Tanguilan v. PMI Employee Leasing*, 832 So.2d 176 (Fla.1st DCA 2002) holding claimant's employment was major contributing cause of his injuries under 440.02(35) where he only momentarily deviated from employment when he lit explosive device while waiting to clock out at the end of the shift. *See, also Orange County MIS Dept. v. Hak*, 710 So.2d 998 (Fla. 1st DCA 1998) holding there may be numerous contributing causes leading to an injury but claimant must establish that the employment~occurrence is the most preponderant cause of the injury.

In the instant case, the most preponderant cause of Claimant's neck injury was simply the act of teaching delinquent students there the risk of being assaulted was a foreseeable part of the job. Because Claimant was performing the essential functions ofhis empplomentwhen the injury occurred the JCC erred in concluding Claimant's injury did not arise out of or occur within the course and scope of employment pursuant to Section 440.02(36).

II. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSATION CLAIMS TO DENY COMPENSABILITY ON BASIS THAT CLAIMANT FAILED TO PROVE HIS INJURIES WITHIN MEDICAL CERTAINTY BY OBJECTIVE FINDINGS AS REQURED BY SECTION 440.09 FLORIDA STATUTES.

On the one hand, the JCC expressly determined that the major contributing cause of Claimant's injuries was his own impermissible act of "throwing David Thompson over his shoulder," in response to being jumped by: the student from behind. "A critical issue is whether Claimant's actions, in causing injury to himself by throwing David Thompson over his shoulder is a deviation from employment as contem-

plated by F.S. 440.02(36)." (I:179). "The fact that Claimant reacted impermissibly and inappropriately to conduct of a stadent is the major contributing cause of the injury." (I:180). However, in the same breadth when challenging the factual predicate of Dr. Lurate's medical opinions on causation, the JCC characterizes Claimant's physical reaction as a failed attempt to grab the student with no evidence Claimant lifted him over his head during the act. (I:181). These two factual characterizations of Claimant's action are inconsistent. Nevertheless, Dr. Lurate testified that the history provided by Claimant was consistent with the injuries he diagnosed Claimant as sustaining.

> "Q: When did you first see Mr. McWilliams, doctor, and what was the history that he presented to you?
>
> A: I have seen him one time, it looks like on November 26, 2002, and the history I got was that. - - I guess, he is a teacher at this wayward school - - or school for wayward kids - - and one of the students jumped him from behind, and in the process of flipping the student off of him, he felt this tearing sensation in his neck, with increased neck pain, and I think, at some point along the way, developed some pain down his arm - - right upper extremity - - originally, treated through workers' comp." (I:125).
>
> Q: Was the injury mechanism, that Mr. McWilliams described to you, a reasonable explanation for the condition you diagnosed and provided treatment?
>
> A: I think it was reasonable.
>
> Q: In other words, within a reasonable degree of medical certainty, was the event that he described, having occurred on October 25, 2002 - - when he flipped the student off of him - - is that, in your estimation, the major cause of the condition that you diagnosed?
>
> A: From what I have to work with, I would say I have no reason to doubt it. It's compatible. (I:129).

Defense counsel questions on cross-examination:

> Q: Okay, and when you use the phrase "flipping him" - - the student, that is - - "overhead," how did you

visualize the mechanism that Mr. McWilliams described to you?.

A: I am envisioning somebody is on my back - - you know, maybe arms around my neck, around my shoulder - - and I kind of reach behind myself, to grab him and shake him, flip him overhead, off of me.

Q: Okay, in other words, over your front, so to speak?

A: Or off to the side or, you know, any way to flip him off of there.

Because the JCC expressly determined that Claimant injured himself when he threw student David Thompson "over his shoulder" (I:179), Dr. Lurate's opinions regarding causation were premised on an accurate factual history when be opined that Claimant sustained herniated disks in his cervical spine when he flipped the student off his back. *Uliman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st DCA 1993) holding not every error or omission in the factual predicate upon which an expert bases an opinion necessarily justifies disregarding that expert's oninion. See, also, Closetmaid v. Sykes 763 So. 2d 377 (Fla. 1st DCA 2000) holding JCC's determination of reasonable medical certainty depends on the substance of the evidence rather than the use of "reasonable medical certainty", terminology, or any other so-called "magic words", by a medical witness. *Id.* at 382.

There was therefore no competent substantial evidence for the JCC to deny compensability on the basis that Claimant failed to prove his injuries with medical certainty by objective findings as required by Section 440.09.

III. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSATION CLAIMS TO DENY TEMPORARY PARTIAL BENEFITS WHERE CLAIMANT DEMONSTRATED A CAUSAL CONNECTION BETWEEN HIS INJURIES AND A LOSS OF INCOME.

In order to prove eligibility for temporary partial disability benefits, a claimant must simply show a connection between his injuries and loss of income. *Jefferson v. Wayne Dalton Corporation*, 793 So.2d 1081 (Fla. 1st DCA 2001). In

the instant case, Dr. Olsen released Claimant back to work with five pound lifting restrictions. (I:178, 179). Dr. Lurate diagnosed Claimant as suffering from herniated disks at C4-5 and C5-6, and testified that if Claimant's condition did not improve he would be a Candidate for an anteriol cervical decompression and fuision at two levels. (l:127). Further. Dr. Lurate imposed restrictions to avoid heavy lifting with his right arm, no repetitive overhead use of the right arm, no overhead work in general, and in fact restricted Claimant to avoid work where he would be required to tilt his head up. (I:12.9). Although the JCC, relying upon the testimony of Stan Callender, determined that Claimant could have returned to work at Escambia Charter School within those restrictions, the record is devoid of any such evidence. In fact to the contrary, the first day after returning to work following his injury Claimant was required to pressure wash the building in clear violation ofthe restrictions imposed by both physicians. (I:21-23). Furthermore, after leaving employment at Escambia Charter School the Claimant conducted an extensive work search and in fact earned approximately two thousand dollars through variqus self-employed jobs. (I:25, 26). The JCC's cynical comparison of the Claimant's work search with the fact that teacher Anna Broxson found employment almost immediately upon leaving Escambia Charter School ignores the fact that Claimant sustained serious on the job cervical injuries before quitting his employment whereas Anna Broxson fortuitously did not.

The JCC therefore erred in denying temporary partial disability benefits to Claimant where he demonstrated through a good faith work search the connection between his loss of income and injuries.

CONCLUSION

There was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant's injuries did not "arise out of work performed within the course and scope of employmept as required by Florida Statutes 440.02(36). Further, there was no competent substantial evidence for the JCC to deny compensability on the basis that

Claimant failed to prove injuries with medical certainty by objective findings as required by 440.09. Lastly, there was no competent substantial evidence for the JCC to deny temporary partial benefits where Claimant dembostrated a connection between his injuries and a loss of income. This court should therefore reverse the JCC's decision and award compensability, temporary partial disability benefits and future medical treatment.

FOR THE FOREGOING REASONS, the Appellant respectfully requests this Court to reverse the JCC's Final Compensation Order of June 13, 2003 and grant Apellant's Motion for Appellate Attorney Fees.

Respectfully submitted,

/s/ [illegible]
Michael J. Valen, Esquire
Florida Bar No.: 997633

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing document have been furnished via. U.S. Mail to the District Court ot Appeais, First District of Florida, 301 Martin Luther King Jr. Blvd., Tallahassee, Florida 32399-1850, and one copy to Roderic C. Magie, Esquire, Esquire, 25 W. Cedar Street, Suite 660, Pensacola, Florida 32501, on this 25th day of November, 2003.

/s/ [illegible]
Michael J. Valen

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
OJCC Case No. 02048703PNS

Michael McWilliams
Claimant,

vs.

AmStaff Human Resources and
Liberty Mutual Group

FINAL ORDER DENYING COMPENSABILITY OF CLAIM, PAYMENT OF TEMPORARY INDEMNITY BENEFITS, AND AUTHORIZATION OF SURGERY/TREATMENT WITH AN ORTHOPEDIST

THIS CAUSE was heard before the undersigned at Pensacola, Escambia County, Florida on May 14, 2003 upon the Claimant's claims for compensability, temporary partial disability benefits from the accident date of October 25, 2002 and continuing, as well as authorization of a treating physician. The petition for benefits were filed November 27, 2002 and January 21, 2003. Mediation occurred on February 21, 2003 (86 days after the initial petition was filed), and a pretrial compliance questionnaire was filed April 3, 2003. The final hearing occurred one hundred sixty-eight (168) days after the initial petition was filed. Present in Pensacola, on behalf of the Claimant was Michael Vaten, Esq. Present in Pensacola on behalf of the Employer/Carrier (hereafter "E/C") was Roderic Magie, Esq.

Each party submitted a Trial Summary pursuant to Rule 4.085(c)(U.P.P.).

Submitted into evidence at the Final Hearing were the following documents, each accepted and placed into evidence without any objection except where noted, as joint exhibits, Claimant's exhibits, or E/C exhibits, with each individual exhibit being further identified by a numerical designation as follows:

JOINT EXHIBITS:

1. The deposition of Dr. R. Barry Lurate was marked as Joint exhibit "1" and accepted as evidence.

EMPLOYER/CARRIER EXHIBITS:

I. The Claimant's resignation letter was marked as E/C exhibit "1" and accepted as evidence.
2. Notice of Denial dated November 5, 2002 was marked as E/C exhibit "2" and accerted as evidence.
3. Response to Petition for Benefits dated November 27, 2002 was marked as E/C exhibit "3" and accepted as evidence.
4. Response to Petition for Benefits dated January 27, 2003 was marked as E/C exhibit "4" and accepted as evidence.

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

1. The parties pretrial compliance questionnaire filed April 2, 2003 was marked as Judge's exhibit "1" for the record.
2. The Trial Summary of the Claimant filed May 12, 2003 was marked as Judge's exhibit "2" for the record.
3. The Trial Summary of the E/C filed May 12, 2003 was marked as Judge's exhibit "3" for the record.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolved this claim. I have not attempted to painstakingly summarize the substance of parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me, and the live testimony of the witnesses who appeared before me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based on the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. Any and all issues raised by way ofthe PFB's, but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant and, therefore, are Denied and Dismissed with prejudice, See *Betancourt vs. Sears Roebuck &. Company Co.*, 693 So.2d 253 (Fla. 1st DCA 1997).
3. Claimant was a teacher at Escambia Charter School (the "employer" herein) starting in July of 2002. He was hired as a cabinet maker to teach students cabinet making and drafting, and also did some maintenance work. His teaching assignments included six classes, including two drafting classes, a DCT class, and two construction classes. Escambia Charter School is designed for at-risk high school students, "at risk" being defined by the school's president and CEO, Stan Callendar, as applying to any student that has a GPA of 2.0 or less, or is credit deficient for age level and grade level. Mr. Callender further testified that as many as forty percent of the student population had been expelled from other ptiblic schools, and that the remainder are at the school as a result of parent choice. The evidence supports that the environinent at the Employer was different from that prevailing at most high schools. I find that the evidence supports that a percentage of students there were discipline problems and that this was known to the management and the teachers.
4. The Claimant was allegedly injured on October 25, 2002. The facts of that occurrence are in some dispute. Claimant testified that on October 25, 2002 a student, David Thompson, poked him in the right shoulder. Claimant testified that his response was to grab Mr. Thompson's hand. Mr. Thompson testified that he approached Claim-

ant during the class in question and told claimant he was "soft." Mr. Thompson's account supports that Claimant did more than "grab" Mr. Thompson's arm. According to Mr. Thompson, Claimant's response was to grasp Mr. Thompson's arm and twist it until Mr. Thompson was brought down to tile ground. Student Justin Godwin's testimony confirmed Mr. Thompson's description. I accept that Mr. Thompson and Mr. Godwin's account of this is the more credible and believable. Claimant's attempt to minimize his reaction (and omit the "twisting" sufficient to bring Mr. Thompson to the ground) to this provocation by Mr. Thompson causes me to doubt Claimant's credibility somewhat. Mr. Thompson testified that Claimant then told him to stop playing before they got in trouble.

Later that afternoon the incident which is the subject of this claim occurred. At that time Mr. Thompson approached Claimant from behind without warning, and according to Mr. Thompson he jumped on Claimant's back, Claimant tried to lift him off of the ground (though Mr. Thompson did not believe be was ever off the ground); reached behind himself to try and grab Mr. Thompson, and when he could not free himself, then he said to Mr. Thompson "let go," "stop," and that was enough "horse playing, for us to stop before we get wrote up." Mr. Thompson re-enacted part of this in the final hearing, during his testimony. Mr. Thompson testified that when Claimant asked him to stop, after first trying to physically react to being grabbed, that Mr. Thompson just let go and that was it. Claimant characterizes the later events as occurring when he was "restraining" a troubled student who grabbed him from behind. Claimant testified that be was grabbed from behind by Mr. Thompson and so Claimant "hit him with a wrestling move as soon as he hit me and brought him tip over my head and held him there and just laid him down." Claimant says that he "stopped it (the move) right in mid air and slowed it down . . . I just dropped

him down." Claimant said that this action occurred rapidly, in split-second. Claimant denied saying anything from the point where Mr. Thompson grabbed him until Claimant had placed Mr. Thompson on the ground. Mr. Freddie Augustine was also a teacher at the Employer. On the date of this incident, Mr. Augustine saw Mr. Thompson "just came over and grabbed him by the arm," and Claimant "told him to leave or go, or something of that sort." Mr. Augustine did not recall seeing Claimant "throw a wrestling maneuver unto the student." Claimant's account of this second "grabbing" incident is at odds with Mr. Thompson's testimony and is not supported by Mr. Augustine, another teacher who was present, and who cannot recall Claimant lifting Mr. Thompson over his head. I find that such a display (holding a teenager over your head) would be noticeable and at least somewhat memorable, and find it persuasive that another teacher who was present does not recall it occurring. However, it is also persuasive that Mr. Chisolm (see below) recalls Claimant telling him the next day that he lifted Mr. Thompson over his head. This temporally proximate rendition of this description supports that Claimant has rendered a consistent descripton of his perception of the facts since the incident. Considering all of the evidence and weighing credibility, I find that the weight of the testimony support's Mr. Thompson's version of the facts of the "grabbing" incident which is the subject of this claim. While Claimant resisted the grab and tried to free himself, I find that be did not lift Mr. Thompson over his head and set him down as attested by Claimant.

The witnesses' testimony is consistent in establishing that this grabbing occurrence was shortly before the bell for the end of the school period and coincidently the end of the school day. When Claimant went to the school office that afternoon, there was no one present to whom he could report the incident. The next day, a Saturday, Claimant and the Principal of the school, Mr. Jerome Chisolm, were both present on Sat-

urday morning for a scheduled event. Claimant approached Mr. Chisoim, and told him that "David (Mr. Thompson) was goofing around and jumped on me," and hurt my neck. Mr. Chisolm testified that on Saturday morning Claimant "casually said that he had hurt his neck from the day prior from throwing David Thompson over his head." At that time, Claimant did not report that he had been "attacked" or "assaulted." At trial Claimant characterizes the incident as being "attacked" by Mr. Thompson. Mr. Chisolm concluded from Claimant's description of the activity that Claimant and Mr. Thompson were engaged in horseplay and that the event was not work related.

5. The principal of Escambia Charter School, Mr. Jerome Chisolm, also testified that it was not uncommon for students to use profanity, engage in horseplay, and generally act up in class.

However, Mr. Callendar denied that horseplay has been a problem at the Employer. Mr. Chisolm testified it was against school policy for both teachers and students to initiate physical contact with one another. That policy was known to the teachers and had been discussed in an earlier meeting of the teachers. Ms. Anna Broxson, a former teacher at the Employer, testified that she witnessed numerous occasions of students initiating physical contact with teachers. She testified that she wrote up disciplinary reports on several of the students on a regular basis for violations of school policies. Claimant also testified that he had written students up. In addition to the school policy discussion at this meeting, Claimant had been specifically talked to about touching students. That conversation arose when Claimant had expressed frustration about the students and intimated that he had felt like "swinging" on one. In that conversation, the school leadership specifically counseled Claimant not to strike or touch a student, and cautioned him of the possible consequences, legal and otherwise, of doing so. All of the knowledgeable

witnesses confirm this. Claimant knew not to touch students, and to refrain from a physical reaction if such occurred. On previous occasions, Claimant had acted appropriately when a student had touched him, telling the student to stop or go away. The testimony of Ms. Broxson, Mr. Augustine, Mr. Callendar and Mr. Chisolm, and Claimant himself clearly demonstrated this knowledge. Horseplay between students and teachers was not allowed or condoned at Escambia Charter School. Claimant knew the proper approach to David Thompson, in response to Thompson's touching of him, was to tell him to stop and not physically react.

6. The following Monday, Claimant was still in pain and complained again to Mr. Chisolm, and expressed doubts about his ability to work that day. Later that week, because no paperwork had been provided to him for completion, Claimant notified Cindi Opachick of AmStaff, who is the staff payroll company that insures Escainbia Charter School for workers' compensation claims, of the incident and requested Medical care for the injury to his neck. An appointment was then scheduled for Claimant to see authorized physician, Dr. J. Ole Olsen, who released Claimant back to work with five pound lifting restrictions. Because the Claimant felt incapable of continuing to work in what be perceived to be an unsafe environment with the inability to defend himself against students, he resigned his position as teacher on November 7, 2002.

7. A critical issue is whether claimant's actions, in causing injury to himself by throwing David Thompson over his shoulder is a deviation from employment as contemplated by F.S.440.02(36) ("Arising out of" pertains to occupational causation. An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death.). A occurrence similar to that is this case, where emotions got the better of reason, is set forth in *Linwood Allen Jones vs. International Pa-*

per Company/Sedgwick James, a District A-West case affirmed by the First District Court of Appeals (a copy of that compensation order and the Appellate Order affirming same are attached hereto and incorporated by reference). In the Order Denying Compensability of Claim arid Payment of Medical Expenses dated July 9, 2000, Jones was found to have been engaged in what was admittedly a part of his job, escorting an uninvited visitor to Jones' work station off the premises. The major contributing cause of the injury to Jones, however, was his anger and frustration at the uninvited visitor, a girlfriend, which anger and frustraflon caused Jones to use excessive force in opening a swinging door through which he and the guest had to exit the premises. Jones projected his right hand with such force that he drove it through the wire enforced one quarter inch glass in the door, severely injuring himself. That action of thrusting his hand through the glass was only a momentary or fleeting deviation from an appropriate job function of escorting the visitor. The Order was appealed and affirmed on a *Per Curiam* basis by the First District Court of Appeal. In the instant case there is a similar coupling of routine job actvities with an un permitted, excessive use of force against a student, causing injury to the teacher. The fact tbat claimant was in a classroom setting, monitoring and supervising students, including unruly students, is not the major contributing cause of the injury.

The fact that Claimant reacted impermissibly and inappropriately to conduct of a student is the major contributing cause of the injury (except for the absence of competent medical opinion testimony to establish the causation, see below). If Claimant had sent Mr. Thompson to the Dean after he was poked in the shoulder and called "soft," the second incident would not have occurred. If claimant had not reacted physically to a student putting his arms around the teacher, but had simply told the student to desist, the injury would not

have occurred. *City of North Bay Village vs. Millerick*, 721 So.2d 1230 (Fla. 1st DCA 1998). This is supported by the credible testimony of Mr. Thompson that when Claimant did ask that he let go, Mr. Thompson immediately did so. Being injured on the premises of the employer is not controlling as to an injury being compensable. *Madden vs. Walt Disney World Company*, 711 So.2d 150 (Fla. 1st DCA 1998); Admittedly, Claimant's action in attempting to free himself was momentary. However, it was no more momentary than the actions in *Jones*, and was a continuation of his earlier inappropriate behavior. I find that the competent evidence does not support that the Claimant was in the course and scope of his employment when he injury occurred. On the basis of lack of substantial competent evidence, I deny the compensability of the claim under F.S. 440.02(36).

8. Claimant says that when he was grabbed, he lifted Mr. Thompson overhead and set him down, injuring his own neck. This testimony is consistent with what he told his supervisor the next morning, and with the history be later provided to Dr. Lurate. I have observed he demeanor of the witnesses and I conclude that Claimant did not lift Mr. Thompson over his head and set him down (see above). Dr. Lurate recorded a history of Claimant being grabbed from behind, bending down, and "lifting the student over my head." Dr. Lurate concluded from his examination, review of diagnostic tests, and the history provided by Claimant that the incident was the major cause of the Claimant's right C4-5 and C5-6 herniated disc. The determination of major contributing cause is a legal determination upon which expert medical evidence may be persuasive. *Closet Maid v. Sykes*, 763 So.2d 377 (Fla. 1st DCA 2000). Clearly "[c]ausation of non-observable injuries is essentially a medical question." *Lindsay v. TVS Trucking Co., Claims Center*, 565 So.2d 864 (Fla. 1st DCA 1990); *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st

DCA 1993). I find the causation of injury to be questionable in this case because the history (lifting a student overhead) which Claimant provided to Dr. Lurate and which he rendered at trial is not credible or believable. Where the factual predicate is flawed, the opinion maybe rejected. *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st DCA 1993). The Court held "Of course not every error or omission in the factual predicate upon which an expert bases an opinion necessarily justifies disregarding that expert's opinion. On the other hand, some facts are so critical to the validity of the opinion as to dictate the opposite result, namely, rejection of the expert opinion. In a given case, therefore, the question ultimately will resolve itself into a judgment call by the trier of fact; and, on review, the exercise of this judgment should be entitled to the same presumption of correctness as other factual conclusions made by the trier of fact, and should not be reversed except upon a showing of abuse of discretion.)" In *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 863 (Fla. 1st DCA 1993), the requirement of asking the expert what effect the misrepresentations or flaws would have had on her/his opinion(s), was also rejected. Instead, *Ullman*, the Court adopted for workers' compensation cases, and applied, the standard for civil cases enunciated by the Florida Supreme Court in *Easkold v. Rhodes*, 614 So.2d 495 (Fla. 1993), According to this standard, the Office of the Judge of Compensation Claims is not compelled to accept the conclusions of the expert(s) where that opinion or conclusion is not supported by a proper factual predicate. Dr. Lurate was not asked what his opinion was regarding the causation of Claimants neck complaints assuming the Claimant resisted and tried to grab Mr. Thompson (and failed), but did not lift Mr. Thompson over his head. Because I find the credible evidence does not support the factual history provided to Dr. Lurate, I find that the causation of Claimant's injuries has not been proven to a reasonable degree of medical certainty by objective medi-

cal findings as required by Fla. Stat. §440.09. I have considered all of the evidence in reaching this conclusion, including the lay testimony of the onset of pain. However, the only testimony of the onset of pain/symptoms is that of Claimant (whose testimony regarding the lifting of the student overhead I have already determined to lack credibility). On the basis of the lack of competent expert testimony, based upon an accurate history of the facts of the incident to establish causation to a reasonable degree of medical certainty, I would deny compensability of this claim.

9. The E/C asserts that Claimant was engaged in horse play and that the horse play caused the injury. The "horse play" doctrine operates to deny compensation to an employee, who, although at work, engages in playful activity that is substantial enough to amount to a deviation from employment. *Times Publishing Co. vs. Walters*, 382 So.2d 720 Fla. 1st DCA 1980). *Walters*, sets forth the factors to be considered in determining whether an employee's horseplay is substantial enough to preclude compensability. These are (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (whether it involved an abandonment of employinent duties), (3) the extent to which similar activity had either been forbidden or had become an accepted or tolerated practice, and (4) the extent to which the horseplay may have been expected or reasonably foreseeable. The extent of the deviation is a key inquiry. *Times Publishing Co.* involved a momentary deviation without obvious danger, which occurred during a lull in work with no abandonment of employment duties. The extent of deviation (1) in this case was substantial. Claimant clearly violated the school policy against physical contact with students, and with the earlier arm twisting he risked causing injury to the student whose care and supervision he was charged with. The completeness of the deviation (2) is a more difficult question. Claimant bad not abandoned his job

duties, was not ignoring the other students, and did not leave the area his class was in. The practice of touching students was clearly impermissible and all of the teachers clearly knew that. Teachers testified that students touching them was also clearly not permitted and that students were written up and disciplined for such touching. Although Mr. Callendar testified that "horse play" was not a problem at the school, it was a problem with Claimant. In spite of this, however, the Employer had not disciplined Claimant in any significant way (beyond some verbal counseling in conjunction with discussion of other matters). Claimant did not discipline Mr. Thompson when he was poked, but instead responded in kind and twisted Mr. Thompson's arm, somewhat violently. Mr. Thompson was left with the impression that they were "playing" around and that it was permissible as long as the Dean did not catch them. Claimant did not enforce order, and then send Mr. Thompson to the dean or write him up, or otherwise discipline him for the poking. The touching of Claimant (poking) by this student, and the reciprocal touching of the student (twisting) by Claimant was accepted by each, in violation of the school rules. I find that the similar activity (3) was clearly forbidden. The instances of past touching, for which students had been disciplined or written up, were supported by various evidence from teachers and management. Therefore, while not accepted or tolerated, the evidence supports that such physical contact was reasonably foreseeable (4).

Thus of the four factors enunciated in *Times Publishing Co.*, the extent of the deviation and forbidden factors each support a finding of horseplay. Similarly, the completeness and the forseeability factors support a finding of this deviation not constituting horseplay. Thus the question of whether this incident amounts to horseplay is a close question. Claimant's reaction was neither appropriate nor professional. Claimant's reac-

tion was a deviation from his teaching duties, as confirmed by Stan Callendar, president and CEO of the school, as well as Jerome Chisolm. Although the deviation was brief, the failure to adopt a rationale approach to the situation is the proximate cause of claimant's injury.

Claimant argues that the horse play question is controlled by *Dunlevy v. Seminole County Dept. of Public Safety*, 792 So.2d 592 (Fla. 1st DCA 2901). There, the JCC denied compensability of an injury because it was sustained during horseplay. The claimant was a firefighter who had engaged in "roughhousing" with a fellow employee as the claimant was going off duty and the other was coming on duty. The Court of Appeal reversed the JCC's finding that the claimant's claim was not compensable because of roughhousing. As noted by the Count in *Dunlevy* in addressing the issue of deviation

> We conclude that these facts are more consistent with case law in which the courts have found that a momentary deviation from work duties does not rise to the wholesale abandonment necessary to bar a claim based upon the doctrine of horseplay. See, e.g., *Boyd v. Florida Mattress Factory, Inc.*, 128 So.2d 881 Fla. 1961); *Jean Fluet, Inc. v. Harrison*, 652 So.2d 1209 (Fla. 1st DCA 1995); *B & B Cash Grocery Stores v. Wortman*, 431 So.2d 171 Fla. 1st DCA 1983); *Times Publ'g Co. v. Walters*, 382 So.2d 720 Fla. 1st DCA 1980). *Dunlevy, supra* at 594.

Claimant asserts that injuries arising even out of one's own "stupidity" are compensable. A lack of common sense has not been a complete defense in this area of workers' compensation law. *Jean Fluet, Inc. v. Harrison*, 652 So.2d 1209 (Fla. 1st DCA 1995). See also, *Tanguilan v. PMI Employee Leasing*, 832 So.2d 176 (Fla. 1st DCA 2002) (holding that a claimant who only momentarily deviated from his employment when he lit an explosive device while waiting to clock out at the end of his shift was compensable).

The E/C asserts that the "horse-playing" engaged in by Claimant in this case is not the type of "horse play" which occurs in "clocking out" and "enforced lull" time cases, which generally are considered minor deviations and, therefore, compensable. *See generally, Tanguilan vs. PMI Employee Leasing*, 27 Fla. Law Weekly D2494; *Dunlevy vs. Seminole Couny Dept. of Public Safety*, 792 So.2d 592 (Fla. 1st DCA 2001). "Enforced lull time" cases include: *Times Publishing Co. vs. Walters*, 382 So.2d 720 (Fla. 1st DCA 1980); *B & B Cash Grocery Stores vs. Wortman*, 431 So.2d 171 (Fla. 1st DCA 1983); *Ivy H. Smith vs. Kates*, 395 So.2d 263 (Fla. 1st DCA 1981). The E/C argues that the facts of this case are instead more analogous to those in a forty year old case, *City of Miami vs. Granlund*, 153 So.2d 829 (Fla. 1963). Distinct from the "clock out" and "lull time" cases, *Granlund*, involved an automobile inspection worker picked up the pistol of a police officer who appeared to have just unloaded all the cartridges. The worker put the weapon to his own head and pulled the trigger, discharging a bullet which the officer had overlooked. The Supreme Court concluded the employee's conduct was foolhardy and constituted "horse play" of such substantial character as to amount to an abandonment of his employment. In *Dunlevy*, the First District Court of Appeal cites Granlund and notes "in those cases where the horseplay doctrine has been applied to deny benefits, the facts show that the claimants significantly departed from standard employee behavior."

I note from Mr. Chisolms' testimony that teachers are told not to joke around with or to try to he friends with the students. He also testified that Claimant's class was all male and he acknowledged that some level of "male bonding" might be expected, in his testimony regarding his impression when the incident was reported that the teacher and student were so engaged at the time. It is also persuasive that this class, on this day, seems to have included some degree of "lulls" from

the testimony of Mr. Thompson. Considering all of the four factors carefully and weighing the importance of each, I find that the Claimant's actions of trying to get Claimant off of his back in this case were wholly inappropriate and a violation of the school rules. In light of Claimant's prior neck injury and his level of education, the actions were inexplicable and ill advised as well. The departure was momentary however, and do not rise to level of "abandonment of employment" as found in *Granlund*. I conclude that the facts of this case do not rise to the level that the horseplay doctrine would preclude a finding of compensability.

10. In addition to the compensability defenses, the employer/carrier has raised defenses of voluntary limitation of income; refusal of employment suitabe to claimant's capacity, and failure to demonstrate a causal connection between the injury and subsequent temporary wage loss. I find that even if the claim was deemed compensable, claimant has not established a claim for temporary indemnity benefits. Claimant has failed to show that his post-injury physical capabilities preclude adequate performance of his teaching job with the employer, from which claimant resigned shortly after the injury. Facts supportive of this conclusion include the unrebutted testimony of Stan Callendar, president and CEO of Escambia Charter School, that claimant could have retained his job with the employer if he had not quit; physical restrictions allowing claimant to return to work as a teacher; subsequent improvement of claimant's condition following the injury, according to claimant's IME physician (Dr. Lurate) who was the only medical expert to testify, in commenting on claimant's ability to bench lift up to 275 pounds; and claimant's failure to look for numerous teaching opportunities in Escambia County and Okaloosa County. *Vencor Hosp. vs. Ahles*, 727 So.2d 968 (Fla. 1st DCA 1998); *STC/Documentation vs. Burns*, 521 So.2d 197, 198 (Fla. 1st DCA 1988); *City of Claremont vs. Rumph*,

450 So.2d 573, 576 (Fla. 1st DCA 1984); *Interim Services vs. Levy*, 28 FLWD 546; *Mason vs. Home Shopping Network*, 28 FLWD 492. It is persuasive that Claimant has not tried to look for work in the Escambia County School system, or even contacted that school district regarding full time or substitute teaching employment. Of note, Ms. Broxson also quit work at the Employer during the same school year (January 2003) that Claimant did and almost immediately (in January 2003) became employed full time as a math teacher with the Escambia County Schools. Whether Claimant would have enjoyed similar success will never be known only because be never made any contact with that school system to inquire or try. I find that even if the claim for compensability of the neck injury were granted, the claims for temporary indemnity benefits would be appropriately denied on the basis of this voluntary limitation of income and Claimant's failure to demonstrate the wage loss is causally related to the injury(ies) and/or resulting restrictions. *Vencor Hosp.*

Wherefore, it is ORDERED AND ADJUDGED:

1. Claimant's claim for compensability of his neck injury is DENIED. As to this claim, the E/C shall go forth without day.

DONE AND ORDERED in Chambers, Pensacola, Escambia County, Florida on this 13th day of June, 2003.

/s/ [illegible]
Judge of Compensation Claims

[SEAL]

CERTIFICATE

This is to certify that the above FINAL ORDER DENYING COMPENSABILITY OF CLAIM; PAYMENT OF TEMPORARY INDEMNITY BENEFITS, AND AUTHORIZATION OF SURGERY/TREATMENT WITH AN ORTHOPEDIST was entered on the date stated, and that copies were mailed to the parties counsel as set forth below.

/s/ [illegible]
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